

EXHIBIT 1

[FILED UNDER SEAL]

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 SHERMAN DIVISION

4
5 ----- X

6 THE STATE OF TEXAS , ET AL. ,
7 PLAINTIFFS ,
8 V. CASE NO. 4 : 20 - CV - 00957 - SDJ
9 GOOGLE LLC ,
10 DEFENDANT .

11 ----- X

12
13 HIGHLY CONFIDENTIAL
14 ATTORNEYS ' EYES ONLY
15 VIDEOTAPE DEPOSITION OF
16 IGNATIUS A. GRANDE
17 DECEMBER 19 , 2024
18 9 : 06 A . M .
19
20
21
22
23

24 JOB NO. CS7075142
25

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Page 2

1
2 VIDEOTAPED DEPOSITION OF IGNATIUS A.
3 GRANDE, TAKEN BY DEFENDANT PURSUANT TO
4 NOTICE, HELD AT THE OFFICES OF NORTON ROSE
5 FULBRIGHT US LLP, 1301 AVENUE OF THE
6 AMERICAS, NEW YORK, NEW YORK 10019,
7 STENOGRAPHICALLY TAKEN BEFORE MAUREEN RATTO,
8 A REGISTERED PROFESSIONAL REPORTER,
9 CERTIFIED COURT REPORTER AND NOTARY PUBLIC.
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Page 3

1 A P P E A R A N C E S :

2
3 ON BEHALF OF THE PLAINTIFFS - THE STATE OF
4 TEXAS, ET AL.:

5 NORTON ROSE FULBRIGHT US LLP

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8 BY: JAMES S. RENARD, ESQ.

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10 DANIELLA TORREALBA, ESQ.

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Page 4

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6 ALEX.ABSTON@LANIERLAWFIRM.COM

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8 ON BEHALF OF THE DEFENDANT - GOOGLE LLC:

9 GIBBS & BRUNS, LLP

10 1100 LOUISIANA

11 WORLD TRADE CENTER

12 HOUSTON, TEXAS 77002

13 BY: AYESHA NAJAM, ESQ.

14 ANAJAM@GIBBSBRUNS.COM

15 ELISA WULFSBERG, ESQ.

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18 FRESHFIELDS BRUCKHAUS DERINGER, LLP

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Page 5

1 A P P E A R A N C E S , C O N T I N U E D :

2 A L S O P R E S E N T :

3 R O N A L D M A R R A Z Z O , L E G A L V I D E O S P E C I A L I S T

4 J O N A T H A N J A F F E

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Page 6

1 VIDEOPGRAPHER: GOOD MORNING.
2 WE ARE NOW GOING ON THE RECORD. THE
3 TIME IS APPROXIMATELY 9:06 A.M. IT
4 IS THE 20TH OF DECEMBER, 2024.

5 PLEASE NOTE THAT THE
6 MICROPHONES ARE SENSITIVE AND MAY
7 PICK UP WHISPERING AND PRIVATE
8 CONVERSATIONS. PLEASE MUTE YOUR
9 PHONES AT THIS TIME.

10 AUDIO AND VIDEO RECORDING WILL
11 CONTINUE TO TAKE PLACE UNLESS ALL
12 PARTIES AGREE TO GO OFF THE RECORD.

13 THIS IS THE VIDEO-RECORDED
14 DEPOSITION OF IGNATIUS GRANDE IN
15 THE MATTER OF STATE OF TEXAS, ET AL
16 VERSUS GOOGLE LLC.

17 THIS CASE IS FILED WITH THE
18 UNITED STATES DISTRICT COURT, FOR
19 THE EASTERN DISTRICT OF TEXAS,
20 SHERMAN DIVISION. DOCKET NO. IS
21 4:20-CV-00957-SDJ. LOCATION OF THIS
22 DEPOSITION IS NORTON ROSE
23 FULBRIGHT, LOCATED AT 1301 AVENUE
24 OF THE AMERICAS IN NEW YORK CITY.

25 MY NAME IS RON MARRAZZO

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Page 7

1 REPRESENTING VERITEXT LEGAL
2 SOLUTIONS. AND OUR COURT REPORTER
3 IS MAUREEN RATTO, FROM THE FIRM OF
4 VERITEXT LEGAL SOLUTIONS.

5 I AM NOT RELATED TO ANY PARTY
6 IN THIS ACTION, NOR AM I
7 FINANCIALLY INTERESTED IN ITS
8 OUTCOME.

9 IF THERE ARE ANY OBJECTIONS TO
10 THIS PROCEEDING PLEASE STATE THEM
11 AT THE TIME OF YOUR APPEARANCE. ALL
12 COUNSEL ATTENDING LIVE WILL STATE
13 THEIR APPEARANCES AND AFFILIATIONS
14 FOR THE RECORD, BEGINNING WITH THE
15 NOTICING ATTORNEY.

16 MS. NAJAM: AYESHA NAJAM FROM
17 GIBBS & BRUNS ON BEHALF OF GOOGLE.
18 ALONG WITH ME, SHE WILL NOT BE
19 QUESTIONING, IS ELISA WULFSBERG,
20 ALSO FROM OUR FIRM.

21 MR. RENARD: JIM RENARD AND
22 DANIELLA TORREALBA FROM NORTON ROSE
23 FULBRIGHT AND ALEX ABSTON WITH THE
24 LANIER LAW FIRM, REPRESENTING THE
25 PLAINTIFFS AND THE WITNESS.

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Page 8

1 VIDEOPHOTOGRAPHER: VERY GOOD. WE
2 CAN NOW SWEAR IN THE WITNESS AND
3 PROCEED.

4 * * *

5 I G N A T I U S A. G R A N D E,
6 HAVING BEEN FIRST DULY SWORN ACCORDING
7 TO LAW BY THE OFFICER, TESTIFIES AS
8 FOLLOWS:

9 DIRECT EXAMINATION BY MS. NAJAM:

10 Q. MR. GRANDE, HAVE YOU EVER BEEN
11 DEPOSED BEFORE?

12 A. I HAVE NOT.

13 Q. BUT AM I RIGHT THAT YOU USED
14 TO PRACTICE LAW?

15 A. THAT'S CORRECT.

16 Q. WHEN YOU PRACTICED LAW DID YOU
17 PARTICIPATE IN DEPOSITIONS?

18 A. I DID.

19 Q. SO CAN I FAIRLY ASSUME THAT
20 YOU UNDERSTAND THE BASIC PROCESS OF
21 DEPOSITIONS IN TERMS OF QUESTIONS AND
22 ANSWERS AND THE RECORD AND OBJECTIONS?

23 A. I DO.

24 Q. OKAY. THE TWO THINGS I DID
25 WANT TO REMIND YOU OF BEFORE WE GO ANY

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Page 9

1 FURTHER IS THAT WE WILL BE TAKING BREAKS
2 AND WE WILL BASICALLY BE BREAKING ONCE
3 EVERY HOUR, BUT IF SOMETHING ARISES AND
4 YOU NEED A BREAK QUICKER THAN ROUGHLY
5 ONCE A HOUR, PLEASE LET ME KNOW.

6 THE SECOND THING TO REMEMBER
7 IS OBVIOUSLY THE REPORTER IS GOING TO
8 TAKE DOWN EVERYTHING WE SAY AND I ASK YOU
9 TO PLEASE WAIT FOR ME TO FINISH MY
10 QUESTIONS BEFORE YOU ANSWER.

11 FINALLY, IF I ASK YOU
12 SOMETHING AND IT DOESN'T MAKE ANY SENSE
13 OR YOU SIMPLY NEED IT RESTATED, PLEASE
14 LET ME KNOW AND I CAN DO THAT FOR YOU.
15 HOWEVER, IF YOU ANSWER THE QUESTION LIKE
16 I ASKED IT, CAN I PLEASE ASSUME THAT YOU
17 UNDERSTOOD MY QUESTION?

18 A. CAN YOU --

19 Q. SO IF I ASK YOU A QUESTION,
20 AND YOU DON'T ASK FOR CLARIFICATION, AND
21 YOU GO AHEAD AND ANSWER THAT, CAN I
22 ASSUME THAT YOU UNDERSTOOD MY QUESTION AS
23 ASKED?

24 A. YES.

25 Q. NOW, MR. GRANDE, ARE YOU

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Page 10

1 CURRENTLY IN THE FIELD OF EDISCOVERY
2 CONSULTING?

3 A. YES, THAT'S CORRECT.

4 Q. DO YOU HAVE A LAW DEGREE?

5 A. I DO.

6 Q. AND THAT WAS FROM GEORGETOWN;
7 IS THAT CORRECT?

8 A. GEORGETOWN UNIVERSITY LAW
9 CENTER.

10 Q. ARE YOU CURRENTLY ACTIVELY
11 LICENSED TO PRACTICE LAW IN ANY STATE?

12 A. I AM.

13 Q. WHAT STATE IS THAT?

14 A. NEW YORK AND CONNECTICUT.

15 Q. HAVE YOU EVER HAD A LICENSE TO
16 PRACTICE LAW IN THE STATE OF TEXAS?

17 A. NO.

18 Q. CALIFORNIA?

19 A. NO.

20 Q. HAVE YOU PRACTICED LAW SINCE
21 2018?

22 A. NO.

23 Q. AND AM I RIGHT THAT THAT WAS
24 THE YEAR WHEN YOU MOVED FROM PRACTICING
25 LAW INTO EDISCOVERY CONSULTING WITH BRG?

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Page 11

1 A. YES.

2 Q. DO YOU STILL REFER TO YOURSELF
3 AS A LAWYER?

4 A. I STILL AM AN ATTORNEY. I'M
5 NOT A PRACTICING ATTORNEY.

6 Q. IF SOMEONE ASKS YOU AT A
7 COCKTAIL PARTY WHAT YOU DO DOES LAWYER
8 ENTER YOUR ANSWER?

9 MR. RENARD: OBJECTION TO
10 FORM.

11 A. I USUALLY REFER TO MYSELF AS A
12 TECHNOLOGY ADVISOR, EDISCOVERY ADVISOR.

13 Q. BUT YOU ARE STILL AN ATTORNEY
14 IN YOUR VIEW; IS THAT RIGHT?

15 A. YES.

16 Q. SO AS YOU PROBABLY HEARD OFF
17 THE RECORD, I REPRESENT GOOGLE IN THIS
18 LAWSUIT. YOU DON'T REPRESENT ANY OF THE
19 STATES WHO HAVE BROUGHT THIS LAWSUIT, DO
20 YOU?

21 A. NO.

22 Q. AND IN FACT, AM I RIGHT THAT
23 YOU WERE HIRED BY ONE OF THOSE STATES,
24 MORE SPECIFICALLY THE ATTORNEY GENERAL OF
25 TEXAS?

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Page 12

1 A. YES.

2 Q. SO TO RECAP THAT, YOU'RE AN
3 ATTORNEY WHO'S BEEN HIRED BY THE
4 PLAINTIFFS' ATTORNEYS TO OFFER THE
5 OPINION THAT YOU OFFER IN THIS CASE; IS
6 THAT RIGHT?

7 A. NO.

8 Q. YOU WEREN'T OFFERED TO -- YOU
9 WEREN'T HIRED TO OFFER OPINIONS IN THIS
10 CASE?

11 A. YES.

12 Q. OKAY. AND ONE OF THOSE
13 OPINIONS HAS TO DO WITH WHETHER GOOGLE
14 SPOLIATED EVIDENCE; RIGHT, SIR?

15 A. NO.

16 Q. IS IT YOUR OPINION THAT GOOGLE
17 SPOLIATED EVIDENCE?

18 A. IT'S -- IT'S MY OPINION THAT
19 DATA WAS NOT PRESERVED IN A TIMELY MANNER
20 IN THIS MATTER.

21 Q. SIR, YOU USED THE WORD
22 SPOLIATION IN YOUR EXPERT REPORT IN THIS
23 CASE, DIDN'T YOU?

24 A. I BELIEVE I DID IN THE CONTEXT
25 OF -- OF MY CONCLUSIONS, YES.

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Page 13

1 Q. IT'S ONE OF YOUR CONCLUSIONS,
2 IS IT NOT?

3 A. THE DATA WAS LOST, CORRECT.

4 Q. AND MY QUESTION WASN'T WHETHER
5 YOU OPINED THAT DATA WAS LOST. ISN'T IT
6 TRUE THAT YOUR OPINIONS, WHETHER WE'RE
7 TALKING ABOUT YOUR REPORT OR YOUR
8 DECLARATIONS, ACCUSE GOOGLE OF
9 SPOLIATION?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. I MAKE NO ACCUSATIONS, ONLY
13 OPINIONS IN MY EXPERT REPORT.

14 Q. ONE OF YOUR OPINIONS THAT
15 YOU'RE OFFERING TO THE COURT -- LET'S
16 BACK UP.

17 ONE OF THE THINGS THAT YOU
18 SUBMITTED BEFORE YOU ISSUED A REPORT IN
19 THIS CASE WAS A DECLARATION; DO YOU
20 RECALL THAT?

21 A. YES.

22 Q. YOU SIGNED A DECLARATION
23 PURSUANT TO THE LAWS OF PERJURY, RIGHT?

24 A. CORRECT.

25 Q. AND YOU KNEW THAT THAT

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Page 14

1 DECLARATION WAS TO BE SUBMITTED IN
2 SUPPORT OF A MOTION SEEKING SANCTIONS
3 AGAINST MY CLIENT, RIGHT?

4 A. YES.

5 Q. AND YOU KNEW THAT THE
6 DECLARATION WAS BEING SUBMITTED IN
7 SUPPORT OF AN ALLEGATION OF SPOLIATION;
8 RIGHT, SIR?

9 A. YES.

10 Q. AND THE WORD "SPOLIATION",
11 THAT MEANS THE LOSS OR DESTRUCTION OF
12 POTENTIALLY RELEVANT EVIDENCE AT A TIME
13 WHEN A PARTY WAS UNDER A DUTY TO PRESERVE
14 IT; IS THAT RIGHT?

15 A. YES, THAT SOUNDS ABOUT RIGHT.

16 Q. AND IN YOUR REPORT YOU USE THE
17 PHRASE "THIS IS WHAT MAKES GOOGLE'S
18 SPOLIATION IN THIS CASE SO DAMNING"; DO
19 YOU RECALL THAT?

20 A. I BELIEVE SO, YES.

21 Q. OKAY. AND YOU ARE OPINING,
22 AREN'T YOU, ON THE STANDARDS THAT YOU
23 BELIEVE GOOGLE SHOULD HAVE FOLLOWED WITH
24 RESPECT TO RETENTION OF CHAT MESSAGES, IN
25 PARTICULAR, CORRECT?

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Page 15

1 A. YES.

2 Q. YOU'RE OFFERING AN OPINION ON
3 GOOGLE'S DUTIES IN THIS CONTEXT, RIGHT?

4 A. CORRECT.

5 Q. AND YOU'RE ALSO OPINING THAT
6 GOOGLE VIOLATED THOSE DUTIES, RIGHT, SIR?

7 A. YES.

8 Q. OKAY. SO TO START -- TO GO
9 BACK TO WHERE WE STARTED, YOU'RE A LAWYER
10 WHO'S BEEN HIRED BY THE PLAINTIFFS'
11 LAWYERS TO OFFER AN OPINION RELATED TO
12 THE ACCUSATIONS THAT GOOGLE SPOLIATED
13 EVIDENCE, TRUE?

14 MR. RENARD: OBJECTION TO
15 FORM.

16 A. YES.

17 Q. I TAKE IT YOU ARE FAMILIAR
18 WITH THE FEDERAL RULE OF EVIDENCE 37(E)?

19 A. I AM.

20 Q. AND AM I RIGHT THAT RULE
21 ALLOWS A COURT TO IMPOSE SANCTIONS FOR A
22 PARTY'S FAILURE TO PRESERVE WHAT WE'RE
23 GOING TO CALL ESI, THAT IS ELECTRONICALLY
24 STORED INFORMATION?

25 A. YES.

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Page 16

1 Q. AND YOU ARE OPINING IN THIS
2 CASE, AREN'T YOU, SIR, THAT ALL THE
3 ELEMENTS OF 37(E) WERE MET HERE?

4 MR. RENARD: OBJECTION TO
5 FORM.

6 A. MY ROLE IS NOT TO MAKE LEGAL
7 OPINIONS IN THIS CASE. I -- I HAVE OPINED
8 TO WHETHER OR NOT GOOGLE PRESERVED
9 EVIDENCE IN COMPLIANCE WITH INDUSTRY
10 STANDARDS AND PRACTICES.

11 Q. OKAY. I WANT TO MAKE SURE I
12 UNDERSTOOD THAT.

13 WHEN YOU SAID YOUR ROLE IS TO
14 NOT MAKE LEGAL OPINIONS IN THIS CASE, IS
15 THE REASON FOR THAT THAT YOU THINK THAT
16 WOULD BE IMPROPER?

17 A. I BELIEVE THAT'S UP TO THE
18 TRIER OF FACT.

19 Q. THE TRIER OF FACT IS THE ONE
20 THAT SHOULD BE DECIDING WHETHER THE
21 ELEMENTS OF 37(E) WERE MET, AGREED?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. YES.

25 Q. AND YOU SAID YOUR ROLE IS TO

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Page 17

1 OPINE ON INDUSTRY STANDARDS AND
2 PRACTICES. DID I HEAR THAT CORRECTLY?

3 A. YES.

4 Q. BUT, SIR, YOUR REPORT
5 REFERENCES NOT JUST INDUSTRY STANDARDS
6 BUT ALSO LEGAL STANDARDS, DOES IT NOT?

7 A. IT REFERENCES THEM.

8 Q. FOR EXAMPLE, THE FEDERAL RULES
9 OF CIVIL PROCEDURE, THOSE ARE LEGAL
10 STANDARDS, RIGHT?

11 A. YES.

12 Q. AND YOU CITE A BUNCH OF CASE
13 -- I'LL ASK A BETTER QUESTION. STRIKE
14 THAT.

15 IN YOUR REPORT YOU CITE TO
16 SEVERAL CASES, THAT IS DECISIONS FROM
17 COURTS ACROSS THE UNITED STATES IN
18 SUPPORT OF YOUR OPINIONS, RIGHT, SIR?

19 A. YES.

20 Q. THAT'S LAW, RIGHT?

21 A. YES.

22 Q. BACK TO RULE 37(E). ISN'T IT
23 TRUE THAT UNDER THAT RULE BEFORE A COURT
24 IMPOSES SANCTION AGAINST A PARTY THE
25 MOVANT FIRST HAS TO SHOW THAT THE PARTY

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Page 18

1 WAS OBLIGATED TO REVIEW CERTAIN ESI?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. YES, THAT'S MY UNDERSTANDING.

5 Q. SORRY FOR STEPPING ON YOUR
6 ANSWER.

7 ISN'T IT TRUE THAT GOOGLE
8 FAILED TO PRESERVE CERTAIN ESI,
9 SPECIFICALLY CHAT MESSAGES?

10 A. YES.

11 Q. AND DOESN'T A PARTY UNDER THAT
12 RULE ALSO HAVE TO SHOW THAT THE PRODUCING
13 PARTY FAILED TO DO SO; THAT IS, FAILED TO
14 LIVE UP TO ITS OBLIGATIONS TO PRESERVE
15 THAT ESI?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 A. YES.

19 Q. AND ISN'T ONE OF YOUR OPINIONS
20 IN THIS CASE THAT GOOGLE FAILED TO DO
21 THAT WITH RESPECT TO CERTAIN CHAT
22 MESSAGES?

23 A. YES.

24 Q. AND UNDER RULE 37(E), ISN'T
25 THE NEXT ELEMENT THAT THE PARTIES SHOW

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Page 19

1 THAT ESI WAS LOST BECAUSE THE PRODUCING
2 PARTY FAILED TO TAKE REASONABLE STEPS TO
3 PRESERVE IT?

4 MR. RENARD: OBJECTION TO
5 FORM.

6 A. THAT'S MY UNDERSTANDING.

7 Q. AND ISN'T ONE OF YOUR OPINIONS
8 IN THIS CASE THAT ESI WAS, IN FACT, LOST
9 BECAUSE OF GOOGLE'S ALLEGED FAILURE TO
10 TAKE REASONABLE STEPS?

11 A. YES.

12 Q. AND FINALLY, ISN'T IT TRUE
13 THAT UNDER RULE 37(E), THE MOVANT MUST
14 SHOW THAT THE ESI THAT WAS LOST CANNOT BE
15 RESTORED OR REPLACED?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 A. IF WE'RE GOING TO BE GOING
19 THROUGH THE FEDERAL RULES I WOULD ASK
20 THAT I BE PRESENTED WITH A FULL COPY OF
21 THE RULES WHICH WERE ATTACHED TO MY
22 REPORT.

23 Q. ARE YOU UNABLE TO ANSWER MY
24 QUESTION WITHOUT SEEING THE TEXT OF RULE
25 37(E)?

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Page 20

1 A. IF WE'RE GOING TO CONTINUE
2 GOING THROUGH IT I WOULD APPRECIATE
3 HAVING THE RULE IN FRONT OF ME.

4 Q. I WILL GIVE IT TO YOU BUT I
5 STILL WANT AN ANSWER TO MY QUESTION. MY
6 LAST QUESTION HAD TO DO WITH THE ELEMENT
7 OF THE LOST ESI. ARE YOU ABLE TO ANSWER
8 THAT WITHOUT ME HANDING YOU A COPY OF
9 THAT RULE?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. YOU CAN REASK THE QUESTION.

13 Q. ISN'T IT TRUE THAT A MOVANT
14 UNDER 37(E) HAS TO BE ABLE TO SHOW THAT
15 THE LOST ESI CANNOT BE RESTORED OR
16 REPLACED?

17 MR. RENARD: OBJECTION TO
18 FORM.

19 A. I BELIEVE SO.

20 Q. AND WE WILL LOOK AT THE RULE
21 THAT YOU CITE IN YOUR REPORT, BUT I WANT
22 TO KEEP GOING FOR A MINUTE.

23 THOSE FOUR ELEMENTS WE JUST
24 WENT THROUGH, ARE THOSE ELEMENTS THAT
25 COURTS ROUTINELY DETERMINE ON THEIR OWN

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Page 21

1 WITHOUT THE HELP OF EXPERT TESTIMONY --

2 MR. RENARD: OBJECTION TO
3 FORM.

4 MS. NAJAM: I HADN'T FINISHED
5 MY QUESTION WHEN YOU OBJECTED.

6 MR. RENARD: I'M SORRY.

7 MS. NAJAM: NO PROBLEM. I'LL
8 REASK FOR THE RECORD.

9 Q. ISN'T IT TRUE THAT THE
10 ELEMENTS THAT I WENT THROUGH FOR 37(E),
11 THOSE ARE ONES THAT THE COURT ROUTINELY
12 DETERMINE WITHOUT THE HELP OF EXPERT
13 TESTIMONY?

14 MR. RENARD: OBJECTION TO
15 FORM.

16 A. I -- I COULDN'T -- I DON'T
17 KNOW THE ANSWER TO THAT. I HAVEN'T
18 RESEARCHED EVERY CASE THAT HAS OPINED ON
19 THAT ISSUE AND I'M AGAIN NOT HERE AS AN
20 ATTORNEY.

21 Q. IN TERMS OF WHAT YOU HAVE AND
22 HAVE NOT RESEARCHED ON THIS ISSUE, YOU
23 CITED CASES IN YOUR DECLARATION AND YOUR
24 REPORT IN SUPPORT OF YOUR ARGUMENT THAT
25 GOOGLE DID SOMETHING WRONG HERE, RIGHT,

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Page 22

1 SIR?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. I DID CITE TO CASES IN MY
5 REPORT AND DECLARATION, YES.

6 Q. I'M NOT JUST ASKING IF YOU
7 CITED THE CASES. MY QUESTION IS -- I'LL
8 ASK A DIFFERENT ONE.

9 YOU CITED TO CASES POINTING
10 OUT THAT OTHER COMPANIES HAVE GOTTEN INTO
11 TROUBLE FOR FAILING TO PRESERVE EVIDENCE.
12 DO YOU RECALL THAT?

13 A. YES.

14 Q. AND YOU GAVE EXAMPLES OF
15 INSTANCES WHERE OTHER COMPANIES FAILED TO
16 PRESERVE CERTAIN ESI THAT RESULTED IN
17 THEM BEING SANCTIONED, RIGHT?

18 A. YES.

19 Q. SO ARE YOU FAMILIAR ENOUGH
20 WITH THE CASES ON THIS TOPIC TO CITE TO
21 SOME IN YOUR REPORT?

22 A. YES.

23 Q. OKAY. SO I WANT TO TALK ABOUT
24 -- LET'S BACK UP A SECOND.

25 YOU HOLD YOURSELF OUT AS

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Page 23

1 HAVING 25 YEARS OF EXPERIENCE IN THE
2 FIELD OF EDISCOVERY, RIGHT?

3 A. I BELIEVE MORE THAN 20 YEARS,
4 APPROXIMATELY 20.

5 Q. APPROXIMATELY 25. IN THAT 25
6 YEARS?

7 MR. RENARD: OBJECTION TO
8 FORM.

9 Q. DID YOU SAY APPROXIMATELY 20?

10 A. I BELIEVE MY -- I BELIEVE MY
11 REPORT, WHICH I DON'T HAVE IN FRONT OF
12 ME, I SAID APPROXIMATELY 20 YEARS. BUT,
13 YOU KNOW, I STARTED PRACTICING IN 2001,
14 SO...

15 Q. MY APOLOGIES. I MISHEARD YOU.
16 IN THAT APPROXIMATELY 20 YEARS
17 DO YOU TRY TO KEEP ABREAST, HAVE YOU
18 TRIED TO KEEP ABREAST OF THE LAW, THAT IS
19 THE DECISIONS OF COURTS ON THE TOPIC OF
20 SPOLIATION?

21 A. IN MY ROLE AS AN EDISCOVERY
22 CONSULTANT, I DO -- THAT'S PART OF WHAT I
23 DO IS KEEP ABREAST OF INDUSTRY STANDARDS
24 AND PRACTICES AND THAT DOES INCLUDE
25 FOLLOWING CASE LAW ON THE TOPIC OF NOT

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Page 24

1 JUST SPOLIATION, BUT NUMEROUS ISSUES
2 RELATING TO ESI AND EDISCOVERY.

3 Q. AND, SIR, AM I RIGHT THAT IN
4 YOUR CURRENT ROLE, ONE OF THE THINGS YOU
5 DO IS YOU ACTUALLY ADVISE PRACTITIONERS
6 AND COMPANIES ON WHAT YOU BELIEVE TO BE
7 BEST PRACTICES IN TERMS OF ESI
8 PRESERVATION, RIGHT, SIR?

9 A. YES, THAT'S FAIR.

10 Q. AND ISN'T IT TRUE THAT ONE OF
11 THE THINGS YOU CURRENTLY DO IS ADVISE
12 FOLKS ON HOW TO AVOID BEING SANCTIONED?

13 A. I WOULD -- I WOULDN'T SAY
14 THAT'S WHAT I'M RETAINED TO DO BUT THAT'S
15 PART OF WHEN I ADVISE A COMPANY IS I DO
16 NOT WANT THEM TO GET SANCTIONED.

17 Q. AND AN IMPORTANT PART OF
18 ADVISING A COMPANY ON HOW NOT TO GET
19 SANCTIONED IS FOLLOWING AND KEEPING
20 ABREAST OF THAT CASE LAW ABOUT
21 PRESERVATION OF ESI, RIGHT?

22 A. YES.

23 Q. SO IN DOING THAT, IN THE LAST
24 20 YEARS CAN WE AGREE THAT YOU HAVE
25 WITNESSED COURTS ROUTINELY DECIDE

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Page 25

1 SPOLIATION MOTIONS WITHOUT THE ASSISTANCE
2 OF EDISCOVERY CONSULTANTS?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. I WOULD SAY I CAN'T ANSWER
6 THAT -- NO, BECAUSE I -- WHEN I REVIEW
7 OPINIONS FOR THE HOLDING IT DOES NOT
8 NECESSARILY PROVIDE INFORMATION ON
9 WHETHER OR NOT THERE WAS AN EDISCOVERY
10 CONSULTANT INVOLVED AT SOME JUNCTURE OF
11 THE CASE.

12 SO I COULDN'T SAY WHETHER OR
13 NOT AN EDISCOVERY CONSULTANT WAS INVOLVED
14 WITH ANY GIVEN OPINION THAT I MAY HAVE
15 READ ON SANCTIONS.

16 Q. CAN YOU NAME US ONE OPINION
17 YOU'VE EVER READ ON SANCTIONS WHERE THE
18 OPINION CITED TO AN EDISCOVERY
19 CONSULTANT?

20 MR. RENARD: OBJECTION TO
21 FORM.

22 A. I CAN'T RECALL.

23 Q. CAN YOU NAME ONE OPINION THAT
24 YOU'VE READ IN THE LAST 20 YEARS WHERE
25 THE COURT RELIED ON, IN DETERMINING A

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 26

1 SPOLIATION MOTION, AN EDISCOVERY EXPERT?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. I CAN'T RECALL.

5 Q. AM I RIGHT THIS IS THE FIRST
6 TIME YOU'VE BEEN HIRED BY A PARTY TO
7 SUPPORT THEIR REQUEST FOR SANCTIONS
8 AGAINST ANOTHER PARTY BASED ON ALLEGED
9 SPOLIATION?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. THAT HAS -- NO. THAT'S BEEN A
13 PART OF MY REPRESENTATION OF OTHER
14 CLIENTS. I WOULD SAY I HAVEN'T BEEN
15 RETAINED SOLELY FOR THAT PURPOSE
16 PREVIOUSLY.

17 Q. SO YOU'RE SAYING THAT IN
18 REPRESENTING OTHER CLIENTS, YOU HAVE ALSO
19 SERVED AS AN EXPERT ROLE IN THE CONTEXT
20 OF A MOTION FOR SANCTIONS AGAINST ANOTHER
21 PARTY?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. NO. I'VE ADVISED CLIENTS.

25 Q. OKAY. PUTTING ASIDE THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 27

1 ADVISING -- LET ME ASK A BETTER QUESTION.
2 BEFORE THIS CASE, HAVE YOU
3 EVER SWORN UNDER OATH, WHETHER LIVE
4 TESTIMONY OR IN A DECLARATION, ON BEHALF
5 OF PARTY A THAT PARTY B, OPPOSING PARTY,
6 SPOLIATED?

7 A. NO, I DON'T BELIEVE SO.

8 Q. THIS IS THE FIRST TIME?

9 A. THAT'S MY RECOLLECTION.

10 Q. IN TERMS OF WHEN -- WHEN A
11 DUTY TO PRESERVE ARISES WITH RESPECT TO
12 ANY PARTICULAR LITIGATION OR
13 INVESTIGATION, CAN WE AGREE THAT IS AN
14 ISSUE OF COMMON LAW?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. I WOULD AGREE THAT COMMON LAW
18 INFORMS THAT DETERMINATION, YES.

19 Q. IT DOESN'T JUST INFORM IT,
20 IT'S THE ROOT OF THE DUTY, TRUE?

21 MR. RENARD: OBJECTION TO
22 FORM.

23 A. AGAIN, I'M NOT HERE TO PROVIDE
24 LEGAL OPINIONS. SO I'M HERE, YOU KNOW --
25 THAT IS MY UNDERSTANDING.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 28

1 Q. ARE YOU AN EXPERT ON THE
2 COMMON LAW OF THE FIFTH CIRCUIT ON
3 PRESERVATION OF ESI?

4 MR. RENARD: OBJECTION TO
5 FORM.

6 A. I'M HERE -- I AM AN EXPERT. I
7 AM PROVIDING EXPERT OPINIONS REGARDING
8 EDISCOVERY AND DOCUMENT PRESERVATION,
9 WHETHER OR NOT IT RELATES TO THE FIFTH
10 CIRCUIT OR NOT, BUT YES.

11 Q. SO I UNDERSTAND WHAT YOU'RE
12 HERE DOING, AND WE'RE GOING TO GET TO
13 THAT, I JUST WANT TO KNOW A LITTLE --
14 SOMETHING A LITTLE DIFFERENT. I'LL ASK A
15 BROADER, EASIER QUESTION.

16 ARE YOU AN EXPERT ON THE
17 COMMON LAW IN THE FIFTH CIRCUIT ON
18 ANYTHING?

19 MR. RENARD: OBJECTION TO
20 FORM.

21 A. THE OPINIONS THAT I PROVIDE
22 REGARD EDISCOVERY AND ARE INFORMED BY
23 COMMON LAW, WHETHER IT'S THE FIFTH
24 CIRCUIT OR NOT.

25 Q. HAVE YOU EVER HELD YOURSELF

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 29

1 OUT AS AN EXPERT ON THE COMMON LAW
2 REGARDING PRESERVATION OF EVIDENCE?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. I WOULD HOLD MYSELF OUT AS AN
6 EXPERT IN THE FIELD OF EDISCOVERY.

7 Q. SO NOT SPECIFICALLY COMMON LAW
8 GOVERNING THE DUTY TO PRESERVE, TRUE?

9 A. I WOULD SAY COMMON LAW
10 COVERING THE DUTY TO PRESERVE IS A PART
11 OF ADVISING ON EDISCOVERY AND
12 UNDERSTANDING THAT.

13 Q. TOTALLY GET THAT. HERE IS MY
14 -- HERE IS WHAT I'M TRYING TO GET AT.
15 YOU HAVE A CV THAT YOU HAVE PROVIDED IN
16 THIS CASE, RIGHT, SIR?

17 A. YES.

18 Q. IT'S ATTACHED TO YOUR REPORT,
19 WHICH I PROMISE WE'RE GOING TO LOOK AT
20 LATER.

21 A. YES.

22 Q. AND YOU ALSO HAVE A WEBSITE
23 BIOGRAPHY ASSOCIATED WITH BRG, THAT IS
24 BERKELEY RESEARCH GROUP, WHERE YOU
25 CURRENTLY ARE, RIGHT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 30

1 A. RIGHT.

2 Q. AND YOU ALSO HAVE A WEBSITE
3 ASSOCIATED WITH -- LET'S BACK UP.

4 ARE YOU CURRENTLY STILL
5 TEACHING AT ST. JOHNS LAW SCHOOL?

6 A. NOT -- I'M NOT CURRENTLY
7 TEACHING A COURSE BUT YES, I HAVE TAUGHT
8 A COURSE AT ST. JOHNS LAW SCHOOL.

9 Q. WHEN DID YOU STOP TEACHING
10 THAT COURSE?

11 A. I HAVEN'T TAUGHT IT IN
12 APPROXIMATELY FIVE OR SIX YEARS.

13 Q. AND IF I GO TO THE ST. JOHNS
14 WEBSITE UNDER FACULTY THERE IS A
15 BIOGRAPHY OF YOU THERE AS WELL, RIGHT?

16 A. THAT'S CORRECT.

17 Q. AND WHEN YOU WRITE
18 PUBLICATIONS ABOUT ELECTRONIC -- SORRY --
19 ESI I TAKE IT YOU ALSO SUBMIT BIOGRAPHIES
20 WITH SOME OF THOSE, IS THAT ACCURATE, IN
21 TERMS OF A DESCRIPTION OF WHO YOU ARE AND
22 WHAT YOU DO?

23 A. IF I WRITE AN ARTICLE IT WOULD
24 PROBABLY HAVE MY NAME AND WHERE I WORK,
25 BUT NOT A BIOGRAPHY.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 31

1 Q. WELL, IN ANY OF THOSE EXAMPLES
2 THAT WE JUST WENT THROUGH WHERE YOU
3 DESCRIBE YOUR OWN QUALIFICATIONS IN YOUR
4 OWN WORDS, HAVE YOU EVER WRITTEN, "I'M AN
5 EXPERT IN THE COMMON LAW OF THE DUTY TO
6 PRESERVE?"

7 MR. RENARD: OBJECTION TO
8 FORM.

9 A. I'VE NEVER WRITTEN THAT.

10 Q. AND AN EXAMPLE OF SOMEBODY WHO
11 WOULD BE AN EXPERT ON THE COMMON LAW OF
12 WHEN THE DUTY TO PRESERVE STARTS, AN
13 EXAMPLE OF THAT WOULD BE A JUDGE, RIGHT?

14 MR. RENARD: OBJECTION, FORM.

15 A. YES.

16 Q. WHEN YOU USED TO PRACTICE LAW,
17 WHERE WERE THOSE LAW FIRMS LOCATED?

18 A. THEY HAD OFFICES THROUGHOUT
19 THE COUNTRY AND GLOBALLY, BUT I WAS
20 LOCATED IN NEW YORK STATE.

21 Q. AND THEN I SAW THAT YOU
22 CLERKED FOR A JUDGE. I DON'T HAVE YOUR CV
23 PULLED UP. WHERE WAS THAT JUDGE?

24 A. IN PENNSYLVANIA.

25 Q. AND I TAKE IT YOU CURRENTLY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 32

1 LIVE AND WORK IN THE NEW YORK
2 METROPOLITAN AREA; IS THAT RIGHT?

3 A. THAT'S CORRECT.

4 Q. HAVE YOU EVER -- IN ANY PART
5 OF YOUR CAREER HAS YOUR PRACTICE FOCUSED
6 ON THE FIFTH CIRCUIT?

7 MR. RENARD: OBJECTION, FORM.

8 A. I HAVE PRACTICED IN CASES WHEN
9 I WAS AN ATTORNEY IN TEXAS.

10 Q. HOW MANY?

11 A. I COULDN'T RECALL BUT I --
12 WHEN I WAS AT CLIFFORD CHANCE I
13 REPRESENTED MERRILL LYNCH IN THE ENRON
14 MATTER.

15 Q. ENRON LITIGATION WAS GOING ON
16 WHEN I BECAME A LAWYER, SO I REMEMBER WAY
17 TOO MUCH ABOUT THAT. WE'LL COME BACK TO
18 THAT IN A MINUTE. LET ME JUST SUM UP
19 WHAT WE HAVE DISCUSSED.

20 DO YOU HAVE ANY EXPERTISE ON
21 THE COMMON LAW GOVERNING THE DUTY TO
22 PRESERVE THAT IS SUPERIOR TO THE JUDGE IN
23 THIS CASE AGAINST GOOGLE?

24 A. NO.

25 Q. NOW, RETURNING BACK TO WHAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 33

1 YOU WERE OFFERING OPINIONS ON IN THIS
2 CASE, YOU'RE OFFERING AN OPINION THAT
3 GOOGLE INTENDED TO SPOLIATE EVIDENCE,
4 RIGHT, SIR?

5 A. ACTUALLY, I JUST WANT TO
6 CLARIFY AND MAKE SURE I UNDERSTOOD YOUR
7 LAST QUESTION.

8 JUST TO CLARIFY, YOU KNOW, I
9 DO -- I DO BELIEVE I HAVE, YOU KNOW, MY
10 EXPERT OPINIONS DO INCLUDE INFORMATION ON
11 THE COMMON LAW THAT I THINK IS -- IS
12 RELEVANT TO THIS CASE.

13 MS. NAJAM: OKAY. I'LL OBJECT
14 AS NOT RESPONSIVE.

15 Q. MY QUESTION WAS NOT ABOUT
16 RELEVANCE BUT I DO WANT TO GIVE YOU A
17 CHANCE TO CLARIFY, SO I'M GOING TO REPEAT
18 MY QUESTION AS BEST AS I CAN REMEMBER IT
19 BECAUSE THE -- I DON'T KNOW HOW TO USE
20 THE SCREEN.

21 DO YOU HAVE ANY EXPERTISE ON
22 THE COMMON LAW GOVERNING A LITIGANT'S --
23 SORRY -- A LITIGANT PARTY'S DUTY TO
24 PRESERVE THAT IS SUPERIOR TO A JUDGE IN
25 THIS CASE AGAINST GOOGLE?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 34

1 MR. RENARD: OBJECTION TO
2 FORM.

3 A. I WOULD SAY IN MAKING THE
4 OPINIONS THAT I PROVIDED IN THIS CASE, I
5 DO THAT WITH, YOU KNOW, WITH MY 20-PLUS
6 YEARS OF DEALING WITH EDISCOVERY ISSUES
7 AND THE DIFFERENT FACTORS THAT DO AFFECT
8 THE LITIGATION TRIGGERS AND PRESERVATION.

9 I WOULD SAY IT'S SUPERIOR
10 TO -- YOU KNOW, I -- I -- I -- YOU KNOW,
11 I BELIEVE I BRING AN EXPERTISE TO THAT
12 ISSUE THAT OTHERS WOULD NOT BRING.

13 MS. NAJAM: I'LL OBJECT AS NOT
14 RESPONSIVE.

15 Q. LET ME ASK YOU AGAIN AND WE'LL
16 BREAK IT DOWN.

17 WE'VE ALREADY ESTABLISHED THAT
18 WHEN THE DUTY TO PRESERVE ARISES IS
19 ROUTED IN THE COMMON LAW, AGREE?

20 MR. RENARD: OBJECTION TO
21 FORM.

22 A. AGAIN, AND I BELIEVE I SAID
23 THIS EARLIER, THAT THE DUTY TO PRESERVE,
24 YOU KNOW, THE FOUNDATION OF THE DUTY TO
25 PRESERVE COMES FROM -- STEMS FROM THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 35

1 COMMON LAW BUT HAS BEEN INFORMED, YOU
2 KNOW, BY INDUSTRY STANDARDS AND PRACTICES
3 BY PUBLICATIONS, PEER-REVIEWED
4 PUBLICATION SUCH AS THE SEDONA CONFERENCE
5 MATERIALS WHICH I HAVE CITED. SO I -- I
6 WOULD SAY IT IS MORE THAN JUST INFORMED
7 BY THE COMMON LAW.

8 Q. IT'S -- AGAIN, I WANT TO MAKE
9 SURE WE'RE TALKING ABOUT THE SAME THING.
10 I'M TALKING ABOUT THE "WHEN".

11 WHEN A PARTY'S DUTY TO
12 PRESERVE THAT ARISES IN ANY CASE, THAT
13 ISSUE IS ONE OF COMMON LAW; DO WE AGREE
14 OR ARE WE DISAGREEING?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. I BELIEVE WHEN COURTS COME TO
18 THAT DETERMINATION OF WHEN A LITIGATION
19 HOLD IS TRIGGERED OR WHEN PRESERVATION
20 OBLIGATION IS TRIGGERED -- YOU KNOW, IT'S
21 BASED ON -- ON -- I BELIEVE, MORE THAN
22 THE COMMON LAW, PRIOR CASES AND -- AND
23 THE HISTORY OF -- OF HOW THIS ISSUE HAS
24 BEEN ADDRESSED IN OTHER MATTERS.

25 Q. YOU MEAN THE COMMON LAW, THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 36

1 IS CASES ISSUED BY COURTS, RIGHT?

2 A. YES, YES. YEAH, YEAH.

3 Q. I'M SO SORRY. AND DECISIONS
4 MADE BY COURTS, THAT IS WHAT FORMS A
5 COMMON LAW, RIGHT?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. RIGHT. YES.

9 Q. OKAY. SO BACK TO MY PREVIOUS
10 QUESTION.

11 DO YOU HAVE ANY EXPERTISE ON
12 THAT COMMON LAW, THAT SOURCES WHEN
13 SOMEONE'S DUTY TO PRESERVE ARISES THAT IS
14 SUPERIOR TO THAT OF JUDGE JORDAN, HE'S
15 THE PRESIDING JUDGE IN OUR CASE?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 A. MY ROLE IN THIS CASE IS TO
19 PROVIDE, BASED UPON INDUSTRY STANDARDS
20 AND PRACTICE, WHAT I BELIEVE WOULD BE THE
21 LITIGATION TRIGGER OR, YOU KNOW, WHEN A
22 DUTY TO PRESERVE -- WHEN THERE WAS A DUTY
23 TO PRESERVE IN THIS CASE, YOU KNOW, IT IS
24 UP TO THE TRIER OF FACT, AS I MENTIONED
25 EARLIER, TO DETERMINE WHEN THAT IS.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 37

1 YOU KNOW, MY ROLE IS AS AN
2 EDISCOVERY EXPERT TO PROVIDE, YOU KNOW,
3 MY UNDERSTANDING BASED ON MY YEARS OF
4 EXPERIENCE AND WORKING IN OTHER MATTERS
5 WHEN THAT DUTY TO PRESERVE, YOU KNOW, WAS
6 PRESENT IN THIS CASE AND WHETHER DATA WAS
7 LOST THAT SHOULD HAVE BEEN PRESERVED.

8 MS. NAJAM: I'LL OBJECT AS
9 NONRESPONSIVE.

10 Q. THE INDUSTRY STANDARDS AND
11 PRACTICES THAT YOU'RE HERE TO OPINE ABOUT
12 HAVING GIVEN RISE TO A DUTY TO PRESERVE,
13 YOUR TESTIMONY IS THEY'RE NOT THE LAW; AM
14 I HEARING THAT RIGHT?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. NO.

18 Q. THE STANDARDS AND PRACTICES
19 THAT YOU'RE CLAIMING TODAY ARE THE BASIS
20 OF YOUR OPINION, THEY'RE NOT LEGAL
21 STANDARDS, ARE THEY?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. I'M NOT HERE TO PROVIDE LEGAL
25 OPINIONS, I'M HERE TO PROVIDE OPINIONS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 38

1 REGARDING EDISCOVERY AND THE WAY IN WHICH
2 IT WAS APPLIED IN THIS CASE.

3 Q. OKAY. AND YOU'RE ALSO, ONE OF
4 YOUR OPINIONS IS ABOUT GOOGLE'S MOTIVE,
5 IN YOUR VIEW, WHEN IT FAILS TO PRESERVE
6 CHAT MESSAGES THAT YOU CLAIM IT SHOULD
7 HAVE KEPT, TRUE?

8 A. CAN YOU -- CAN I SEE WHAT
9 YOU'RE -- WHAT STATEMENT YOU'RE REFERRING
10 TO?

11 Q. NO. I'M JUST ASK IF ONE OF
12 YOUR OPINIONS IN THIS CASE IS ABOUT
13 GOOGLE'S MOTIVE WHEN IT FAILED TO
14 PRESERVE CERTAIN CHAT MESSAGES THAT YOU
15 OPINE SHOULD HAVE BEEN KEPT?

16 A. I DON'T BELIEVE I HAVE AN
17 OPINION REGARDING GOOGLE'S MOTIVES BUT
18 I'M NOT -- I COULDN'T REALLY ANSWER THAT
19 WITHOUT SEEING THE STATEMENT YOU'RE
20 REFERRING TO.

21 Q. ARE YOU OPINING THAT GOOGLE
22 FAILED TO PRESERVE CHAT MESSAGES WITH AN
23 INTENT TO DEPRIVE THE PLAINTIFFS IN THIS
24 CASE OF ANY EVIDENCE?

25 A. I DON'T BELIEVE I USE THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 39

1 LANGUAGE .

2 Q. IS IT YOUR OPINION THAT GOOGLE
3 WAS ATTEMPTING TO UNDERMINE
4 INVESTIGATIONS OR CASES WHEN IT DECIDED
5 TO NOT RETAIN CERTAIN KINDS OF CHAT
6 MESSAGES?

7 MR. RENARD: OBJECTION TO
8 FORM.

9 A. I BELIEVE I STATED SOMETHING
10 SIMILAR TO THAT.

11 Q. AND SO, SIR, THAT'S AN OPINION
12 THAT WHEN GOOGLE FAILED TO PRESERVE
13 "HISTORY OFF" CHATS, THAT IT DID SO WITH
14 A PARTICULAR MOTIVE, RIGHT?

15 A. I BELIEVE I WAS REFERENCING A
16 DOCUMENT THAT STATED THAT, THAT IS THE
17 DOCUMENT.

18 Q. LET'S LOOK AT YOUR EXPERT
19 REPORT. I'M GOING TO HAND IT TO YOU AFTER
20 I MARKED IT AS EXHIBIT 1. SORRY I DIDN'T
21 BRING ADDITIONAL COPIES. I BROUGHT THEM
22 FROM TEXAS.

23 (GRANDE EXHIBIT 1, EXPERT
24 REPORT OF IGNATIUS A. GRANDE, WAS
25 RECEIVED AND MARKED ON THIS DATE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 40

1 FOR IDENTIFICATION.)

2 Q. TURN WITH ME, SIR, TO PAGE 21,
3 PLEASE -- OOPS, WRONG PAGE.

4 PAGE 13, PARAGRAPH 67, YOU
5 WROTE, "IT IS MY OPINION THAT GOOGLE
6 ATTEMPTED TO UNDERMINE THE INVESTIGATIONS
7 AND CASES THAT WERE STARTING TO FORM,
8 INCLUDING THIS LITIGATION, BY DIRECTING
9 ITS EMPLOYEES TO FIND WAYS TO COMMUNICATE
10 OUTSIDE OF EMAIL COMMUNICATIONS, WHILE AT
11 THE SAME TIME ALLOWING FOR ALL GOOGLE
12 CHATS TO BE 'OFF THE RECORD' AND
13 THEREFORE DELETED." DID I READ THAT
14 CORRECTLY?

15 A. YES.

16 Q. YOU WERE OPINING ON GOOGLE'S
17 INTENT, AREN'T YOU, THERE?

18 MR. RENARD: OBJECTION TO
19 FORM.

20 A. I DON'T KNOW IF I WOULD SAY
21 I'M OPINING ON. I WOULD SAY GOOGLE
22 ATTEMPTED BUT I AM, YOU KNOW, REFERENCING
23 A DOCUMENT THERE THAT HAS LANGUAGE THAT
24 INDICATES THAT WAS THE CASE.

25 Q. IS IT YOUR -- SIR, YOU'RE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 41

1 OFFERING AN OPINION ON THE "WHY", RIGHT?
2 THE "WHY" CERTAIN CHAT MESSAGES WERE NOT
3 PRESERVED, AREN'T YOU?

4 MR. RENARD: OBJECTION TO
5 FORM.

6 A. I MEAN, MY OPINION THERE IS
7 REALLY MERELY RESTATING WHAT WAS THE
8 CONTENT OF THE EMAIL THAT I'M REFERENCING
9 IN THAT -- IN THAT PROVISION.

10 Q. OKAY. LET'S MAKE THIS CLEAR
11 FOR THE RECORD. ARE YOU GOING TO OFFER AN
12 OPINION -- LET ME TRY THAT AGAIN.

13 ARE YOU OFFERING THE COURT AN
14 OPINION IN THIS CASE ABOUT GOOGLE'S
15 INTENT OR MOTIVE WITH RESPECT TO THE
16 FAILURE TO PRESERVE ANY ESI?

17 A. I BELIEVE MY OPINIONS DO
18 REFLECT GOOGLE'S INTENT. I DON'T BELIEVE
19 MY OPINIONS REFLECT MOTIVE. THAT'S MY
20 VIEW.

21 Q. WHAT IS THE DIFFERENCE BETWEEN
22 INTENT AND MOTIVE?

23 A. I WOULD SAY INTENT IS THAT --
24 WOULD REFLECT THAT THE ACTION WAS
25 INTENTIONAL, WAS PLANNED. MOTIVE WOULD

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 42

1 BE, YOU KNOW, WHY THAT WOULD BE THE CASE.

2 Q. IN PARAGRAPH 67 AREN'T YOU
3 OPINING ON WHY CERTAIN ESI WASN'T
4 PRESERVED OR AM I MISREADING IT?

5 MR. RENARD: OBJECTION TO
6 FORM.

7 A. I AM STATING THAT WHAT I STATE
8 IN 67 I'M STATING WOULD BE ONE OF THE
9 REASONS AND, AGAIN, BASED ON THE EMAIL
10 THAT I CITE TO IN THAT PROVISION.

11 Q. THAT IS, IT IS YOUR OPINION
12 THAT WHEN GOOGLE FAILED TO PRESERVE "OFF
13 THE RECORD" CHATS -- LET'S BACK UP AND
14 GET SOME BASICS DOWN FOR THE RECORD.

15 YOUR OPINION IN THIS CASE IS
16 THAT IT INCLUDES THAT GOOGLE FAILED TO
17 PRESERVE CHATS WHERE THE HISTORY WAS
18 MARKED -- SORRY -- WHERE HISTORY WAS LEFT
19 "OFF"; IS THAT RIGHT?

20 A. MY OPINION INCLUDES THAT, YES.

21 Q. IS IT YOUR OPINION THAT IN ITS
22 RETENTION PRACTICES WHEN IT CAME TO CHATS
23 THAT GOOGLE DID THAT IN ORDER TO DEPRIVE
24 SOMEBODY OF EVIDENCE, WHETHER IN AN
25 INVESTIGATION OR CASES?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 43

1 MR. RENARD: OBJECTION TO
2 FORM.

3 A. BASED UPON THE DOCUMENTS THAT
4 I'VE REVIEWED, YES.

5 Q. OKAY. SO YOU DO HAVE AN
6 OPINION ON GOOGLE'S MOTIVE?

7 MR. RENARD: OBJECTION TO
8 FORM.

9 A. THAT OPINION DOES RELATE TO
10 GOOGLE'S MOTIVE BASED ON THAT DOCUMENT,
11 THAT'S CORRECT.

12 Q. AND WHEN YOU SAY "BASED ON
13 THAT DOCUMENT", ARE YOU TALKING ABOUT THE
14 FOOTNOTE 35 DOCUMENT, THE 2008 EMAIL FROM
15 [REDACTED] ?

16 A. YES, I BELIEVE IT WAS FROM
17 KENT WALKER, BUT [REDACTED] DID SEND
18 IT, OR FROM BOTH OF THEM.

19 Q. MY APOLOGIES. WE WILL LOOK AT
20 THAT LATER. IS THAT THE SOLE BASIS OF
21 YOUR OPINION ON GOOGLE'S MOTIVE?

22 MR. RENARD: AND OBJECTION TO
23 FORM.

24 Q. SORRY. GO AHEAD.

25 A. NO.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 44

1 Q. OKAY. SO WHEN I ASKED -- YOU
2 HAVE SAID A COUPLE OF TIMES NOW THAT YOUR
3 OPINION HAVING TO DO WITH THE "WHY" IS
4 BASED ON THAT DOCUMENT. WE LOOKED AT WHAT
5 DOCUMENT YOU WERE TALKING ABOUT AND IT
6 WAS A 2008 EMAIL FROM MR. COUGHRAN AND
7 KENT WALKER. AM I RIGHT SO FAR?

8 A. YES.

9 Q. AND THEN I ASKED YOU WHETHER
10 THAT WAS THE ONLY BASIS FOR YOUR OPINION
11 ABOUT THE "WHY", AND YOUR TESTIMONY IS
12 NO; AM I HEARING THAT CORRECTLY?

13 A. I BELIEVE YOU ASKED IF THERE'S
14 ANY OTHER INFORMATION TO SUPPORT WHY
15 GOOGLE MIGHT HAVE ATTEMPTED TO NOT
16 PRESERVE GOOGLE CHATS.

17 Q. SO THAT 2008 EMAIL IS THE ONLY
18 ONE?

19 A. IS NOT THE ONLY ONE.

20 Q. IS NOT THE ONLY ONE. SORRY FOR
21 ALL THE DOUBLE NEGATIVES. OKAY.

22 SO JUST TO RECAP WHERE WE ARE
23 CURRENTLY, BASED ON THE 2008 EMAIL AND
24 OTHER DOCUMENTS IS WHAT YOU'RE FORMING
25 YOUR OPINION ON GOOGLE'S MOTIVE; IS THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 45

1 FAIR?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. AGAIN, MY -- REFERENCING MY
5 OPINION IN 67, YOU KNOW, THAT STATEMENT
6 IS BASED ON THAT EMAIL. IF YOU'RE -- SO
7 BUT IF YOU'RE ASKING ABOUT A DIFFERENT
8 OPINION -- YOU KNOW, PLEASE IF YOU CAN
9 REFER ME TO THAT OPINION IN MY REPORT.

10 Q. NO. LET'S STICK TO PARAGRAPH
11 67. YOUR OPINION, SIR, THAT GOOGLE
12 ATTEMPTED TO UNDERMINE THE INVESTIGATIONS
13 AND CASES THAT WERE STARTING TO FORM,
14 INCLUDING THIS LITIGATION, BY DIRECTING
15 ITS EMPLOYEES TO FIND WAYS, ET CETERA,
16 WE'VE ALREADY READ IT. THAT OPINION IS
17 BASED SOLELY ON THE 2008 EMAIL FROM [REDACTED]
18 [REDACTED] AND MR. WALKER; IS THAT CORRECT?

19 A. NO.

20 Q. IT'S THE ONLY THING YOU CITE
21 HERE. SO CAN YOU CITE TO ME THE OTHER
22 EVIDENTIARY BASES FOR YOUR OPINION?

23 A. I MEAN, THE OTHER EVIDENTIARY
24 BASIS FOR MY OPINION IS REALLY THROUGHOUT
25 MY REPORT AS FAR AS OTHER DOCUMENTS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 46

1 REFERENCED THAT MAY RELATE TO THE CULTURE
2 WITHIN GOOGLE OF DELETING OR OF NOT
3 PRESERVING GOOGLE CHATS.

4 Q. GOT IT. WE'LL GET THERE.

5 A. YUP.

6 Q. CAN WE AGREE, SIR, THAT IT IS
7 THE COURT'S JOB AND NOT YOURS TO
8 DETERMINE WHETHER GOOGLE FAILED TO
9 PRESERVE ESI THAT IT SHOULD HAVE?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. IN THIS CASE THE TRIER OF
13 FACT, THE COURT WILL MAKE THAT
14 DETERMINATION.

15 Q. AND IT IS THE TRIER OF FACT'S,
16 WHOEVER THAT IS, JOB TO DETERMINE WHETHER
17 GOOGLE SHOULD BE SANCTIONED HERE, RIGHT,
18 NOT YOURS?

19 MR. RENARD: OBJECTION TO
20 FORM.

21 A. YES.

22 Q. AND IT IS THE TRIER OF FACT'S
23 -- WELL, IT'S THE COURT'S JOB TO
24 DETERMINE WHETHER ANY JURY IN THIS CASE
25 SHOULD BE INSTRUCTED TO DRAW AN ADVERSE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 47

1 INFERENCE, RIGHT?

2 MR. RENARD: SAME OBJECTION.

3 A. YES.

4 Q. AND IT IS THE COURT'S JOB TO
5 DETERMINE WHETHER ANY JURY SHOULD BE
6 ASKED ANY QUESTIONS ABOUT SPOLIATION BY
7 GOOGLE, RIGHT?

8 MR. RENARD: DITTO.

9 A. YES.

10 Q. AND YOU'RE NOT HERE TO OFFER
11 ANY LEGAL OPINIONS ON THOSE ISSUES; IS
12 THAT WHAT YOU SAID EARLIER?

13 A. THAT'S CORRECT.

14 Q. IN TERMS OF THE WORK THAT
15 YOU'VE DONE OVER THE LAST -- WELL, LET'S
16 BACK UP.

17 HAS YOUR PROFESSIONAL WORK
18 FOCUSED ON A PRIVILEGED, CONFIDENTIAL,
19 BEHIND-THE-SCENES CONSULTING?

20 A. YES.

21 Q. BEFORE THIS CASE, HAVE YOU
22 EVER BEEN DESIGNATED BY A PARTY IN
23 LITIGATION AS A TESTIFYING EXPERT?

24 A. NO.

25 Q. I SHOULD HAVE ASKED THIS, HAVE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 48

1 YOU EVER TESTIFIED AS AN EXPERT BEFORE?

2 A. NO, I HAVE NOT.

3 Q. HAVE YOU EVER TESTIFIED EVER,
4 LIKE LIVE TESTIMONY?

5 A. NO.

6 Q. CAN YOU TELL ME WHY IT WAS
7 THAT YOUR BEHIND-THE-SCENES CONSULTING
8 WORK WAS, IN YOUR VIEW, PRIVILEGED OR
9 CONFIDENTIAL?

10 A. THE WORK THAT I DO FOR CLIENTS
11 IS ALL CONFIDENTIAL. I MEAN, YOU KNOW,
12 AS FAR AS BEING RETAINED AND WORKING,
13 USUALLY WITH COUNSEL INVOLVED AND --
14 YEAH.

15 Q. IS ONE OF THE REASONS YOU
16 CONSIDER IT CONFIDENTIAL BECAUSE IT'S AN
17 EXTENSION OF THE ATTORNEY-CLIENT
18 PRIVILEGE?

19 A. AT TIMES.

20 Q. WHY ELSE WOULD IT BE
21 CONFIDENTIAL, IF IT'S NOT PRIVILEGED AS
22 THE LAW SEES THAT UNDER ATTORNEY-CLIENT
23 PRIVILEGE?

24 MR. RENARD: OBJECTION TO
25 FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 49

1 A. AS CONSULTANTS ALL OF OUR
2 ENGAGEMENTS, YOU KNOW, INVOLVE
3 CONFIDENTIAL INFORMATION, CONFIDENTIAL
4 ADVICE THAT IS -- WE WOULD NOT OTHERWISE
5 DISCLOSE.

6 Q. SO WHY WOULD ADVICE ABOUT
7 PRACTICES OF RETAINING ESI, WHY WOULD
8 THAT BE CONFIDENTIAL, SOMETHING YOU
9 WOULDN'T WANT OTHERS TO FIND OUT ABOUT?

10 A. FOR A NUMBER OF REASONS BUT,
11 YOU KNOW, IF -- WHEN I WORK WITH A CLIENT
12 THOSE CONVERSATIONS ARE CONFIDENTIAL. I'M
13 NOT GOING TO PUT THAT OUT ON THE WEB OR
14 ANNOUNCE THAT TO THE WORLD.

15 Q. BECAUSE THE DETAILS OF A
16 CLIENT'S EXISTING RETENTION PRACTICES OR
17 WAYS IT MIGHT CONSIDER CHANGING THEM,
18 THOSE ARE THE TYPES OF THINGS COMPANIES
19 DON'T WANT OUT THERE KNOWN TO THE PUBLIC;
20 IS THAT FAIR TO SAY?

21 MR. RENARD: OBJECTION TO
22 FORM.

23 A. NOT -- I WOULDN'T SAY THAT
24 ALWAYS. I THINK SOME COMPANIES COULD
25 PUBLISH THEIR RETENTION POLICIES. SO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 50

1 THEY'RE NOT -- BUT FOR SOMEONE ADVISING
2 THEM, YES, THEY WOULD -- THAT'S --
3 THAT -- YOU KNOW, BUT NOT JUST ON ITS
4 RETENTION POLICIES, ALL THE WORK THAT I
5 DO IS CONSIDERED CONFIDENTIAL AS FAR AS
6 ADVISORY.

7 Q. DO YOU HELP FOLKS WITH
8 LITIGATION HOLDS, LIKE HOW TO WORD THEM?

9 A. I HAVE.

10 Q. AND ARE YOU WILLING TO SHARE
11 TODAY WITH US WHAT THOSE SPECIFIC
12 SUGGESTIONS WERE IN TERMS OF THE
13 INSTRUCTIONS TO PUT IN THE HOLD?

14 A. HOLDS CAN BE UNIQUE AND
15 COMPLEX. YOU KNOW, IF YOU HAVE A SPECIFIC
16 QUESTION?

17 Q. SURE. HAVE YOU EVER ACTUALLY
18 ADVISED A COMPANY BY SAYING, "HERE ARE
19 THE WORDS I SUGGEST YOU USE WITH RESPECT
20 TO THIS LITIGATION HOLD?"

21 A. IF I AM ASKED.

22 Q. HAVE YOU DONE THAT?

23 A. YES.

24 Q. AND WHEN YOU DID THAT DID YOU
25 CONSIDER THAT CONFIDENTIAL?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 51

1 A. YES.

2 Q. IN YOUR REPORT, IF YOU CAN GO
3 TO PAGE 4, PARAGRAPH 4, THERE ARE TWO
4 CASES MENTIONED THERE WHERE YOU WERE
5 APPOINTED AS A NEUTRAL FORENSIC EXAMINER;
6 IS THAT RIGHT?

7 A. YES.

8 Q. IS THAT FIRST ONE PRONOUNCED
9 LIKE THE WORD "MIRACLE" EVEN THOUGH IT'S
10 SPELL WITH AN A-K-L?

11 A. I BELIEVE IT'S MIRAKL.

12 Q. THE MIRAKL AND THE WATCHDOG
13 CASES YOU WERE APPOINTED AS A NEUTRAL
14 EXAMINER; IS THAT RIGHT?

15 A. YES.

16 Q. BY THE WAY, WAS IT YOU, MR.
17 GRANDE, WHO WAS APPOINTED TO SERVE AS THE
18 NEUTRAL OR WAS IT BRG HERE, THE FIRM THAT
19 YOU'RE WITH?

20 A. BRG, AND I WAS THE LEAD
21 FORENSIC ANALYST ON THE CASE. SO I WAS
22 THE ONE IN CORRESPONDENCE WITH THE COURT.

23 Q. OKAY. BUT JUST TO CLARIFY MY
24 QUESTION, IN TERMS OF WHO THE COURT
25 ACTUALLY APPOINTED AS THE NFE, IT WAS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 52

1 BRG, THE COMPANY THAT YOU'RE CURRENTLY
2 WITH; IS THAT RIGHT?

3 A. I BELIEVE THAT'S CORRECT. MY
4 NAME MAY HAVE BEEN LISTED AS WELL IN THE
5 -- IN THE -- IN THE APPOINTMENT BUT BRG
6 WAS THE NEUTRAL FORENSIC -- WAS APPOINTED
7 AND I WAS THE -- YOU KNOW, I BELIEVE I
8 WAS NAMED AS WELL BUT IT WAS BRG WAS THE
9 ENTITY APPOINTED.

10 MS. NAJAM: SO I'M GOING TO
11 MARK THE ORDER FROM THE WATCHDOG
12 CASE AS EXHIBIT 2.

13 (GRANDE EXHIBIT 2, CONSENT
14 ORDER IN RE: IME WATCHDOG, WAS
15 RECEIVED AND MARKED ON THIS DATE
16 FOR IDENTIFICATION.)

17 Q. FOR THE RECORD, CAN YOU PLEASE
18 CONFIRM FOR ME THAT THIS IS THE ORDER IN
19 THE WATCHDOG CASE IN THE EASTERN DISTRICT
20 OF NEW YORK APPOINTING THE NEUTRAL
21 FORENSIC EXAMINER?

22 A. YES. YES.

23 Q. AND IF YOU LOOK AT PAGE 2 IT
24 SAYS EXAMINER SELECTION AND THE
25 APPOINTMENT IS BERKELEY RESEARCH GROUP.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 53

1 DO YOU SEE THAT?

2 A. YES.

3 Q. AND THIS DOESN'T MENTION YOU,
4 IN THE ORDER?

5 A. THE ORDER DOES NOT.

6 Q. YOU CAN PUT THAT ASIDE.

7 CAN YOU EXPLAIN FOR US WHAT
8 YOU DID AS A NEUTRAL FORENSIC EXAMINER IN
9 MIRAKL AND WATCHDOG?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 Q. LET ME CURE THAT OBJECTION.
13 WE'LL TAKE THEM ONE BY ONE.

14 WHAT DID YOU DO AS THE NFE IN
15 WATCHDOG?

16 A. IN IME WATCHDOG V. GELARDI WE
17 IMAGED AND ANALYZED, IT WAS A COMBINATION
18 OF COMPUTERS AND CELLPHONES THAT WERE IN
19 THE POSSESSION OF THE DEFENDANTS AND WE
20 COMPLIED WITH -- I DON'T BELIEVE IT'S --
21 WE COMPLIED WITH THIS, WITH THE CONSENT
22 ORDER FROM THE COURT AND I BELIEVE THERE
23 MAY HAVE BEEN ANOTHER FORENSIC PROTOCOL
24 TO PROVIDE ANALYSIS AND A REPORT TO THE
25 PARTIES REGARDING OUR FINDINGS.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 54

1 Q. DID YOUR ROLE THERE INVOLVE
2 OPINING ON WHETHER THE PARTICULAR PARTY
3 HAD COMPLIED WITH ITS LEGAL OBLIGATIONS
4 OF ESI PRESERVATION?

5 A. NO. THE ROLE WAS A -- IT WAS
6 REALLY MORE FACTFINDING REGARDING WHAT
7 DATA HAD BEEN, YOU KNOW, SEARCHING FOR --
8 FOR RELEVANT SEARCH TERMS. THIS WAS A
9 TRADE SECRET MATTER THAT -- YOU KNOW,
10 FINDING WHETHER DOCUMENTS HAD BEEN TAKEN
11 BY ONE PARTY THAT SHOULDN'T HAVE BEEN
12 TAKEN --

13 Q. GOT IT.

14 A. -- IN THE POSSESSION OF THE
15 OTHER PARTY.

16 Q. SO IT HAD NOTHING TO DO WITH
17 POTENTIAL SPOLIATION?

18 A. NO.

19 Q. OKAY. AND HOW ABOUT MIRAKL,
20 WHAT WAS YOUR ROLE -- WHAT WAS YOUR --
21 WHAT WAS YOUR JOB IN MIRAKL AS THE NFE?

22 A. IN MIRAKL, WE ALSO IMAGED
23 DEVICES THAT WERE IN THAT CASE I BELIEVE
24 IN THE POSSESSION OF THE PLAINTIFFS AND
25 -- AND SIMILARLY FOLLOWED A FORENSIC

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 55

1 PROTOCOL TO IMAGE OR ANALYZE, ANALYZE THE
2 DEVICES AND DOCUMENTS ON THEM AND, YOU
3 KNOW, THIS ALSO INVOLVED A PRIVILEGED
4 STEP AS WELL TO CONFIRM THE PRIVILEGED
5 DOCUMENTS WOULD NOT BE PROVIDED TO THE
6 OTHER SIDE. SO, YOU KNOW, WE WENT
7 THROUGH SEVERAL STEPS WITH THE CLIENTS IN
8 ORDER TO PROVIDE -- PROVIDE THE
9 INFORMATION AT ISSUE AND THEN AGAIN
10 PROVIDE A SHORT REPORT REGARDING OUR
11 FINDINGS IN THAT CASE. AND, AGAIN, THIS
12 WAS A TRADE SECRET CASE.

13 Q. SO I TAKE IT THIS TOO DID NOT
14 INVOLVE AN OPINION FROM YOU ON WHETHER
15 ANY PARTY HAD FAILED TO PRESERVE ESI; IS
16 THAT ACCURATE?

17 A. THAT'S CORRECT.

18 Q. HAVE YOU BEEN APPOINTED AS A
19 NEUTRAL FORENSIC EXAMINER IN ANY OTHER
20 CASES BESIDES THOSE TWO?

21 A. I WAS APPOINTED ALSO IN AN
22 ARBITRATION MATTER, BUT THAT SETTLED SO
23 IT DIDN'T PROCEED.

24 Q. WHEN YOU SAY IT DIDN'T
25 PROCEED, DOES THAT MEAN YOU WERE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 56

1 APPOINTED AS A NFE BUT YOU DIDN'T END UP
2 DOING ANYTHING?

3 A. CORRECT. WE WERE RETAINED BUT
4 THEN THE CASE SETTLED BEFORE WE RECEIVED
5 THE DEVICES.

6 Q. ALL RIGHT. NOW, IF YOU LOOK AT
7 APPENDIX A TO YOUR REPORT, WE'RE NOT
8 GOING TO GO THROUGH IT IN DETAIL, IT'S
9 YOUR CV, IT STARTS ON PAGE 47.

10 A. YES.

11 Q. SINCE SUBMITTING YOUR REPORT,
12 ARE THERE ANY CORRECTIONS OR ADDITIONS
13 THAT YOU WANTED TO MAKE TO YOUR CV?

14 A. THERE WAS ONE DOCUMENT,
15 ALTHOUGH IT SAYS SELECTED PUBLICATIONS,
16 THAT WAS NOT LISTED HERE THAT I FORGOT, I
17 HAD FORGOTTEN ABOUT BUT IT WAS NOT A
18 PUBLISHED ARTICLE. IT WAS AN ARTICLE IN
19 CONNECTION WITH A CONFERENCE IN I BELIEVE
20 2019. AND THERE WERE ALSO TWO ARTICLES
21 FROM 2014 WHICH I DON'T BELIEVE WOULD BE
22 COVERED BY THE SCOPE OF THE TEN-YEAR
23 PERIOD. BUT THAT'S ALL.

24 Q. ALL RIGHT. AND FOR THE
25 SELECTED PUBLICATIONS, IF I SEE SOMETHING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 57

1 LISTED IN SELECTED PUBLICATIONS, DOES
2 THAT MEAN YOU WROTE IT OR CO-WROTE IT?

3 A. YES.

4 Q. AND IF SOMETHING IS IN
5 SELECTED PRESENTATIONS, SAME QUESTION,
6 DOES THAT MEAN YOU EITHER WROTE OR
7 CO-WROTE IT?

8 A. SELECTED PRESENTATIONS ARE
9 PRESENTATIONS/CONFERENCES WHERE I SPOKE
10 ON A PANEL OR MODERATED A PANEL.

11 Q. SO IF THERE IS SOME TYPE OF,
12 LIKE, WRITTEN PRESENTATION ASSOCIATED
13 WITH THESE, WAS IT YOUR PRACTICE TO
14 ACTUALLY PARTICIPATE IN THE DRAFTING OF
15 THE PRESENTATION?

16 A. IF IT WAS A POWERPOINT, YOU
17 KNOW, I MAY HAVE BEEN INVOLVED. IF IT WAS
18 ON OCCASION WITH PANELS, YOU'LL HAVE ONE
19 PARTICIPANT WILL PROVIDE THEIR OWN
20 POWERPOINT WHICH COVERS WHAT THEY'RE
21 SPEAKING ABOUT. SO SOMETIMES THERE WILL
22 BE THE WHOLE PANEL.

23 Q. SOMETIMES YOU'LL FIND A PANEL
24 WITH A SUCKER WHO WILL DO THE WHOLE
25 POWERPOINT FOR ALL OF YOU?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 58

1 A. YES, THAT'S ALWAYS NICE.

2 Q. BUT WHEN YOU DO THAT, WAS IT
3 STILL YOUR PRACTICE TO MAKE SURE YOU WERE
4 COMFORTABLE WITH THE SLIDES BEING SHOWED
5 IN THE PANEL PRESENTATION?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. IF I WAS SPEAKING ABOUT THAT
9 SLIDE, YES, BUT IF SOMEONE ELSE IS
10 SPEAKING ABOUT A SLIDE, AND THAT'S THEIR
11 PART OF THE PRESENTATION, I WOULDN'T HAVE
12 -- THAT'S THEIR BUSINESS.

13 Q. SO THERE WERE NOT ANY DATES
14 LISTED IN YOUR CV FOR YOUR PREVIOUS
15 POSITIONS, SO I WANTED TO REALLY QUICKLY
16 MARK ANOTHER EXHIBIT THAT IS YOUR
17 LINKEDIN PROFILE, WHICH I HAVE MARKED AS
18 EXHIBIT 3.

19 (GRANDE EXHIBIT 3, LINKEDIN
20 PROFILE FOR IGNATIUS A. GRANDE, WAS
21 RECEIVED AND MARKED ON THIS DATE
22 FOR IDENTIFICATION.)

23 Q. CAN YOU CONFIRM FOR US THAT
24 THIS IS, IN FACT, YOUR LINKEDIN PROFILE?

25 A. YES, IT IS.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 59

1 Q. IS THIS SOMETHING THAT YOU
2 KEEP UP-TO-DATE?

3 A. NOT AS MUCH AS I SHOULD BUT I
4 HAVEN'T UPDATED IT IN SOME TIME.

5 Q. WHEN YOU SAY "SOME TIME", ARE
6 YOU TALKING ABOUT FIVE YEARS OR MONTHS?

7 A. I WOULD SAY IT COULD BE FIVE
8 YEARS, MORE IN THAT RANGE, BUT -- OR
9 PARTS OF IT.

10 Q. NOW, IF YOU LOOK AT THE
11 SECTION BEGINNING WITH EXPERIENCE, I
12 WANTED TO SEE IF I COULD SUM THIS UP.

13 AM I RIGHT YOU SPENT ABOUT 13
14 YEARS IN PRIVATE PRACTICE AS A LAWYER AT
15 A LAW FIRM?

16 A. THAT SOUNDS ABOUT RIGHT.

17 Q. AND THEN IN ADDITION TO THAT
18 YOU ALSO SPENT TWO YEARS INHOUSE AT THE
19 LOUIS DREYFUS CORPORATION; IS THAT
20 CORRECT?

21 A. YES.

22 Q. HOWEVER, IF YOU GO TO THE
23 FIRST PAGE, MR. GRANDE, THE SECOND
24 SENTENCE UNDER ABOUT SAYS THAT YOU'VE
25 SERVED AS A NEUTRAL FORENSIC EXAMINER ON

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 60

1 SEVERAL MATTERS. DO YOU SEE THAT ON THE
2 VERY FIRST PAGE UNDER YOUR PICTURE BOX?

3 A. I SEE THAT, YES.

4 Q. SO FIRST PAGE, WHEN YOU SAID
5 "SEVERAL", DID YOU MEAN TWO?

6 A. I MEANT THREE THAT I HAD BEEN
7 RETAINED FOR.

8 Q. BUT IT DOESN'T SAY "RETAINED",
9 IT SAYS HE HAS SERVED AS A NEUTRAL
10 FORENSIC EXAMINER ON SEVERAL MATTERS. DID
11 I READ THAT CORRECTLY FROM YOUR PROFILE?

12 A. YES. AND ON THE NEXT PAGE IT
13 SAYS, "HE REGULARLY SERVES AS A NEUTRAL
14 FORENSIC EXAMINER."

15 Q. I HEAR YOU. SO I'M STILL ON
16 THE FIRST PAGE.

17 A. YEAH.

18 Q. IS IT YOU WHO ACTUALLY TYPED
19 UP THIS DESCRIPTION WHENEVER YOU LAST
20 UPDATED IT?

21 A. I DID.

22 Q. SO WHEN YOU WROTE THAT YOU
23 "SERVED AS A NEUTRAL NFE ON SEVERAL
24 MATTERS", BY "SEVERAL" YOU MEANT TWO,
25 RIGHT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 61

1 A. I MEANT THREE, BUT YES.

2 Q. BUT JUST TO BE CLEAR, ON THE
3 THIRD ONE FOR THE ARBITRATION YOU DIDN'T
4 ACTUALLY END UP SERVING; IS THAT RIGHT?

5 A. I DID SERVE --

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. I DID SERVE. I DIDN'T -- WE
9 DIDN'T PROCEED WITH THE CASE, BUT I WAS
10 RETAINED AND I RECEIVED -- I WAS PAID FOR
11 MY WORK ON THAT CASE.

12 Q. AND, SORRY, I FORGOT TO ASK
13 ABOUT THE LOUIS DREYFUS COMPANY, WHEN YOU
14 WERE THERE.

15 AM I RIGHT THAT THAT COMPANY
16 IS A GLOBAL AGRICULTURAL COMMODITIES
17 TRADING COMPANY?

18 A. THAT'S A FAIR DESCRIPTION.

19 Q. AND JUST TO BE CLEAR, IT'S NOT
20 A TECH COMPANY, IS IT?

21 A. NO.

22 Q. WHEN YOU WORKED AT THOSE THREE
23 LAW FIRMS THAT ARE LISTED HERE, I THINK
24 YOU MENTIONED CLIFFORD CHANCE, DE SANTO
25 AND HUGHES HUBBARD & REID?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 62

1 A. YES.

2 Q. CAN YOU TELL ME ROUGHLY HOW
3 MANY TECH COMPANIES YOU REPRESENTED AT
4 THOSE FIRMS?

5 MR. RENARD: OBJECTION TO
6 FORM.

7 Q. IF ANY?

8 A. I'VE WORKED WITH MANY
9 COMPANIES OVER THE COURSE OF MY CAREER.
10 IT WOULD DEPEND HOW YOU DEFINE "TECH
11 COMPANIES".

12 Q. DO YOU NOT HAVE AN
13 UNDERSTANDING OF WHAT A TECH COMPANY IS?

14 A. I'VE WORKED WITH SAAS
15 COMPANIES, IF THAT'S WHAT YOU CONSIDER
16 A TECH --

17 Q. DID YOU SAY SAAS?

18 A. YES.

19 Q. WHAT DOES THAT STAND FOR?

20 A. SOFTWARE AS A SERVICE.

21 Q. SO HOW MANY SOFTWARE AS A
22 SERVICE COMPANIES DID YOU REPRESENT?

23 A. MORE THAN ONE. AT LEAST A
24 COUPLE.

25 Q. I'M SORRY TO DO THIS AGAIN.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 63

1 WHEN YOU SAY "AT LEAST A COUPLE", DO YOU
2 MEAN AT LEAST TWO?

3 A. YES.

4 MR. RENARD: COUNSEL, WE'VE
5 BEEN GOING OVER AN HOUR, SO
6 WHENEVER YOU GET TO A CONVENIENT
7 BREAKING POINT.

8 MS. NAJAM: I'M ALMOST AT ONE.

9 MR. RENARD: I FIGURED AS
10 MUCH.

11 Q. AND SIR, IN TERMS OF SAAS
12 COMPANIES, AS YOU SAID SOFTWARE AS A
13 SERVICE, HOW MANY OF THOSE COMPANIES HAVE
14 YOU ADVISED WITH RESPECT TO THEIR
15 DOCUMENT RETENTION PRACTICES?

16 A. I CAN'T SAY FOR CERTAIN BUT I
17 DON'T REMEMBER ADVISING ONE OF THE SAAS
18 COMPANIES ON DOCUMENT RETENTION.

19 Q. HAVE YOU EVER, WHETHER IN YOUR
20 CAPACITY AS A LAWYER AT A FIRM OR AN
21 EDISCOVERY CONSULTANT, HOW MANY TIMES
22 HAVE YOU ACTUALLY ADVISED A TECH COMPANY
23 ON DOCUMENT RETENTION?

24 A. I DON'T RECALL.

25 Q. IS IT POSSIBLE YOU'VE NEVER?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 64

1 A. I'VE ADVISED MANY COMPANIES
2 BUT IT'S POSSIBLE I HAVE NOT ADVISED A
3 TECH COMPANY SPECIFICALLY ON DOCUMENT
4 RETENTION.

5 Q. AND THEN FINALLY, HAVE YOU
6 EVER ADVISED ANY -- "FINALLY" AS IN LAST
7 QUESTION BEFORE THE BREAK -- HAVE YOU
8 EVER ADVISED ANY GOVERNMENTAL ENTITIES ON
9 DOCUMENT RETENTION -- SORRY -- MORE
10 SPECIFICALLY ON THEIR DOCUMENT RETENTION
11 POLICIES OR PRACTICES?

12 A. I'VE ADVISED GOVERNMENTAL
13 ENTITIES ON ESI ISSUES BUT I CAN'T RECALL
14 ANY PARTICULAR DOCUMENT RETENTION ISSUES
15 WITH THAT PARTICULAR AGENCY.

16 Q. YOU SAID "THAT PARTICULAR
17 AGENCY". DOES THAT MEAN IT WAS ONE AGENCY
18 IN TERMS OF A GOVERNMENTAL ENTITY THAT
19 YOU ADVISED REGARDING ESI?

20 A. NO, I'VE WORKED WITH MORE THAN
21 ONE ENTITY.

22 Q. BUT, AGAIN, NONE OF THEM
23 INVOLVED ADVISING ON THEIR PRESERVATION
24 OF ESI; IS THAT ACCURATE?

25 A. NOT THAT I CAN RECALL.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 65

1 MS. NAJAM: OKAY. WE CAN TAKE
2 A BREAK.

3 VIDEOGRAPHER: TIME IS 10:15
4 A.M. WE'RE GOING OFF THE RECORD.
5 (RECESS IS TAKEN.)

6 VIDEOGRAPHER: THE TIME IS
7 APPROXIMATELY 10:35 A.M. WE ARE
8 BACK ON THE RECORD.

9 Q. SIR, I'M GOING TO HAND YOU
10 WHAT I AM MARKING AS EXHIBIT 4 TO YOUR
11 DEPOSITION.

12 (GRANDE EXHIBIT 4, BIOGRAPHY
13 OF IGNATIUS A. GRANDE FROM BRG
14 WEBSITE, WAS RECEIVED AND MARKED ON
15 THIS DATE FOR IDENTIFICATION.)

16 Q. CAN YOU JUST CONFIRM FOR ME
17 THAT THIS IS YOUR PROFILE THAT'S
18 AVAILABLE ON BRG'S WEBSITE TODAY?

19 A. YES, I BELIEVE SO.

20 Q. AND IF YOU LOOK AT PAGE 2 OF
21 YOUR BIO, IN THE LAST PARAGRAPH, THE
22 SECOND TO LAST SENTENCE NOTES THAT YOU
23 HAVE TAUGHT AN EDISCOVERY COURSE AT ST.
24 JOHNS UNIVERSITY LAW -- ST. JOHNS
25 UNIVERSITY SCHOOL OF LAW FOR THE LAST SIX

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 66

1 YEARS. THAT'S NOT ACCURATE, IS IT?

2 A. THIS IS OUT OF DATE. I HAVE
3 NOT UPDATED IT IN A WHILE.

4 Q. AM I RIGHT THAT YOU -- ONE OF
5 THE TOPICS YOU HAVE WRITTEN ON IS SOCIAL
6 MEDIA ETHICS OF LAWYERS?

7 A. THAT'S CORRECT.

8 Q. AND ONE OF THE THINGS THAT YOU
9 HAVE OPINED ON IN WRITING IS THAT LAWYERS
10 HAVE AN OBLIGATION TO MAKE SURE THEIR
11 PAGES ARE ACCURATE AND NOT MISLEADING; IS
12 THAT RIGHT?

13 A. I BELIEVE THE -- I BELIEVE
14 THAT STATEMENT IS IN CONNECTION WITH
15 SOMEONE WHO IS PUTTING THEMSELVES OUT TO
16 PRACTICE LAW IN A DIFFERENT AREA THAN IN
17 WHICH THEY PRACTICE.

18 MS. NAJAM: WELL, I'LL OBJECT
19 AS NONRESPONSIVE.

20 Q. MORE GENERALLY YOU HAVE
21 WRITTEN THAT LAWYERS HAVE AN OBLIGATION
22 TO MAKE SURE THAT WHAT THEY PUT OUT THERE
23 TO SELL THEMSELVES AS LAWYERS IS ACCURATE
24 AND NOT MISLEADING; IS THAT TRUE?

25 A. I DON'T BELIEVE THAT'S

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 67

1 ENTIRELY TRUE. AS I SAID, I BELIEVE THAT
2 THAT WAS IN CONNECTION WITH A
3 CONVERSATION ABOUT WHETHER SOMEONE WOULD
4 RETAIN SOMEONE FOR -- ON LINKEDIN, FOR
5 EXAMPLE, IF THEY PUT THEMSELVES OUT AS A
6 CORPORATE LAWYER AND THEY ARE PRACTICING
7 LITIGATION.

8 Q. IS IT YOUR TESTIMONY THAT THE
9 ARTICLES THAT YOU HAVE WRITTEN ARE THAT
10 NARROW IN TERMS OF A LAWYER'S OBLIGATION
11 TO ACCURATELY AND NOT MISLEADINGLY
12 DESCRIBE THEMSELVES FOR PURPOSES OF
13 PROFESSIONAL MARKETING?

14 MR. RENARD: OBJECTION TO
15 FORM.

16 A. I DON'T -- I DON'T RECALL THE
17 STATEMENT YOU'RE REFERRING TO.

18 Q. CAN WE AGREE THAT WHETHER IT'S
19 A LAWYER FOR REPRESENTATION ON A CASE OR
20 A LAWYER WHO IS AN EDISCOVERY CONSULTANT,
21 WHEN YOU DESCRIBE YOURSELF FOR
22 PROFESSIONAL MARKETING PURPOSES IT SHOULD
23 BE ACCURATE AND NOT MISLEADING, TRUE?

24 A. YES, AND I BELIEVE THIS IS
25 ACCURATE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 68

1 Q. IT'S ACCURATE TO SAY THAT YOU
2 HAVE TAUGHT AT ST. JOHNS FOR THE LAST SIX
3 YEARS?

4 A. IT'S OUT OF DATE, BUT I AM
5 STILL ON THE ADJUNCT FACULTY ON THEIR
6 WEBSITE. I'M STILL CONNECTED TO ST. JOHNS
7 AND COULD PRESENT THE COURSE NEXT YEAR,
8 SO IT'S NOT INACCURATE.

9 Q. YOU HAVEN'T TAUGHT IT FOR THE
10 LAST FIVE TO SIX YEARS; IS THAT CORRECT?

11 A. THAT'S CORRECT. THIS STATEMENT
12 IS OUT OF DATE.

13 Q. PRIOR TO THIS CASE, HAVE YOU
14 EVER WORKED AT ANY -- SORRY -- HAVE YOU
15 EVER WORKED WITH ANY OF THE LAW FIRMS WHO
16 ARE CURRENTLY REPRESENTING THE PLAINTIFF
17 STATES IN THIS LAWSUIT? LET ME KNOW IF
18 YOU NEED ME TO NAME THEM FOR YOU.

19 A. OTHER THAN THE FIRMS IN THIS
20 ROOM?

21 Q. BEFORE THIS CASE HAVE YOU EVER
22 WORKED WITH THE LAW FIRM NORTON ROSE
23 FULBRIGHT?

24 A. I DO NOT BELIEVE I HAVE.

25 Q. HAVE YOU EVER WORKED WITH THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 69

1 LANIER LAW FIRM?

2 A. I DO NOT BELIEVE I HAVE. THEY
3 MAY HAVE BEEN INVOLVED WITH ANOTHER CASE
4 I WORKED ON BUT I DON'T BELIEVE SO.

5 Q. AND SAME QUESTION FOR KELLER
6 POSTMAN?

7 A. NOT THAT I'M AWARE OF.

8 Q. BEFORE THIS CASE, HAVE YOU
9 EVER WORKED WITH ANY OF THE LAWYERS WHOM
10 YOU NOW KNOW ARE AMONG THE FOLKS
11 REPRESENTING THE PLAINTIFF STATES?

12 A. NO.

13 Q. BEFORE THIS CASE, HAVE YOU
14 EVER DONE ANY WORK FOR THE STATE OF
15 TEXAS?

16 A. NO.

17 Q. ON WHAT DATE WERE YOU ENGAGED
18 FOR THIS CASE?

19 A. ON NOVEMBER 27TH.

20 Q. AND WHEN DID YOU START DOING
21 WORK?

22 A. EITHER ON THAT DATE OR THE
23 FOLLOWING DATE, NOVEMBER 28TH.

24 Q. SO IS IT ACCURATE TO SAY THAT
25 YOU FORMED YOUR OPINIONS IN THIS CASE IN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 70

1 A MATTER OF A COUPLE OF WEEKS?

2 A. YES.

3 Q. IS IT YOUR TESTIMONY THAT ALL
4 OF YOUR OPINIONS IN YOUR REPORT ARE
5 REBUTTING AN OPINION OF MR. MALKIEWICZ?

6 A. THAT IS CORRECT.

7 Q. AND YOU REMEMBER FROM
8 PRACTICING LAW WHAT IT MEANS TO BE A
9 REBUTTAL EXPERT, RIGHT, SIR?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. I HAVE AN UNDERSTANDING OF
13 WHAT IT MEANS TO BE A REBUTTAL EXPERT.

14 Q. DOES THAT UNDERSTANDING
15 INCLUDE THAT YOUR OPINIONS SHOULD BE
16 CONFINED TO REBUTTING THE PERSON'S
17 OPINIONS THAT YOU'VE BEEN DESIGNATED TO
18 RESPOND TO?

19 A. AS A REBUTTING EXPERT MY
20 OPINIONS ARE INTENDED TO REBUT ANOTHER
21 EXPERT'S OPINIONS.

22 Q. BECAUSE IF THEY DON'T, THEN
23 THAT'S JUST A NEW OPINION, RIGHT?

24 MR. RENARD: OBJECTION TO
25 FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 71

1 A. I COULDN'T SAY.

2 Q. ARE YOU AWARE THAT IN THIS
3 CASE THERE IS A -- THERE WAS AN AGREEMENT
4 SETTING FORTH A SPECIFIC SCHEDULE FOR
5 EXPERTS RELATING TO CHAT MESSAGES?

6 A. I AM NOT AWARE OF THE
7 SCHEDULE.

8 Q. HOW MANY HOURS DID YOU
9 PERSONALLY SPEND ON THIS CASE IN THAT
10 COUPLE OF WEEKS?

11 A. I BILLED APPROXIMATELY 120
12 HOURS ON THIS CASE.

13 Q. IS THAT TO DATE?

14 A. YES.

15 Q. DID YOU HAVE A TEAM WORKING ON
16 THIS ENGAGEMENT WITH YOU?

17 A. I -- A COLLEAGUE ASSISTED WITH
18 RESEARCH.

19 Q. WHEN YOU SAY "RESEARCH", ARE
20 WE TALKING, LIKE, LEGAL RESEARCH?

21 A. NO, PUBLICLY AVAILABLE
22 RESEARCH.

23 Q. DID YOU -- YOU ATTENDED MR.
24 MALKIEWICZ'S DEPOSITION ON TUESDAY; IS
25 THAT RIGHT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 72

1 A. YES.

2 Q. AND BY "ATTEND" I MEAN LIKE IN
3 PERSON, YOU WERE IN THE ROOM DURING HIS
4 DEPOSITION, CORRECT?

5 A. YES.

6 Q. DID YOU ATTEND REMOTELY THE
7 DEPOSITION THAT OCCURRED THE DAY BEFORE
8 OF PROFESSOR HOCHSTETLER?

9 A. NO.

10 Q. DID YOU READ HIS DEPOSITION
11 TRANSCRIPT?

12 A. NO.

13 Q. DID YOU READ PORTIONS OF IT?

14 A. I DON'T BELIEVE SO.

15 Q. ALL RIGHT. LET'S GO TO YOUR
16 REPORT, IT'S EXHIBIT 1. I WANT TO TURN
17 TO PAGE 59, IT'S APPENDIX C.

18 NOW, THE TITLE OF THIS
19 APPENDIX IS MATERIALS CONSIDERED. DO YOU
20 SEE THAT?

21 A. YES.

22 Q. MR. GRANDE, DID YOU REALLY
23 REVIEW OVER 200 DEPOSITIONS IN THAT
24 TWO-WEEKS SPAN?

25 A. THE MATERIALS CONSIDERED ARE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 73

1 DOCUMENTS I WAS PROVIDED ACCESS TO.

2 Q. OKAY. SO YOU SAID
3 "CONSIDERED", BUT WHAT YOU MEANT WAS THIS
4 IS THE UNIVERSE OF DOCUMENTS TO WHICH I
5 HAD ACCESS; DID I RECAP THAT CORRECTLY?

6 A. YES, INCLUDING SOME WHICH I
7 REVIEWED OR REVIEWED PARTS OF BUT THESE
8 WERE NOT RELIED UPON IN MY REPORT.

9 Q. SURE. THERE IS A WHOLE OTHER
10 APPENDIX FOR MATERIALS THAT YOU ACTUALLY
11 RELIED ON, RIGHT?

12 A. YES.

13 Q. BUT I WANT TO STICK TO
14 APPENDIX C. TO RECAP WHAT APPENDIX C
15 REALLY IS, IS STUFF YOU COULD HAVE LOOKED
16 AT; IS THAT FAIR TO SAY?

17 MR. RENARD: OBJECTION TO
18 FORM.

19 A. NO, THERE'S -- I DID LOOK AT
20 SOME DOCUMENTS ON THIS LIST.

21 Q. SURE. SO HERE IS MY QUESTION,
22 LOOKING AT YOUR ENTIRE REPORT AND ALL OF
23 ITS APPENDICES, HOW AM I TO DETERMINE
24 WHICH DEPOSITION YOU ACTUALLY READ?

25 A. THE DEPOSITIONS WHICH I RELIED

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 74

1 UPON IN MY REPORT ARE LISTED IN APPENDIX
2 B IN DRAFTING MY OPINIONS.

3 Q. THAT MAKES SENSE BUT MY
4 QUESTION WAS DIFFERENT.

5 WHERE CAN I FIND A LIST OF
6 DEPOSITIONS OR DOCUMENTS THAT YOU
7 ACTUALLY READ BUT JUST DIDN'T RELY UPON?

8 A. THERE IS NO LIST OF THAT
9 PARTICULAR SUBSET.

10 Q. OKAY. SO THERE IS A LIST OF
11 THINGS THAT YOU'RE RELYING ON AND THERE
12 IS A LIST OF STUFF THAT WAS AVAILABLE TO
13 YOU, BUT THERE IS NO LIST OF MATERIALS
14 THAT YOU REVIEWED BUT DIDN'T RELY ON; IS
15 THAT ACCURATE?

16 A. YES.

17 Q. CAN YOU TELL US HOW MANY
18 DEPOSITIONS YOU ACTUALLY REVIEWED?

19 A. IT WAS SOMEWHERE, I WOULD SAY,
20 BETWEEN 14, PROBABLY UP TO 20 DIFFERENT
21 DEPOSITIONS, BUT I COULDN'T RECALL
22 EXACTLY.

23 Q. OKAY. SO YOU'RE LOOKING AT --

24 A. I DON'T HAVE A LIST.

25 Q. SORRY. YOU'RE LOOKING AT PAGE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 75

1 47, THAT'S YOUR RELIED UPON LIST; IS THAT
2 RIGHT?

3 A. YES.

4 Q. SO THE ANSWER IS SOMETHING
5 GREATER THAN 14?

6 A. THAT'S CORRECT.

7 Q. AND THEN I'M ASSUMING THE SAME
8 APPLIES TO THE REST OF APPENDIX C BEYOND
9 DEPOSITIONS?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 Q. SO, FOR EXAMPLE, GO TO PAGE
13 65. YOU LISTED HERE A TON OF -- MORE
14 SPECIFICALLY 30 -- WELL, OVER 100 EXPERT
15 REPORTS AND DECLARATIONS. YOU DIDN'T
16 ACTUALLY REVIEW ALL THESE, DID YOU?

17 A. NO, I DID NOT REVIEW ALL OF
18 THEM.

19 Q. AND THEN SAME QUESTION FOR THE
20 LONG LIST OF BATE STAMPED DOCUMENTS
21 CONTAINED IN APPENDIX C, THAT IS JUST A
22 LIST OF DOCUMENTS THAT WERE MADE
23 AVAILABLE, THAT DOESN'T MEAN YOU ACTUALLY
24 REVIEWED THEM; IS THAT ACCURATE?

25 A. I REVIEWED SEVERAL DOCUMENTS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 76

1 -- MANY DOCUMENTS IN THIS CASE. I
2 COULDN'T SAY HOW MANY OF THE ONES IN
3 APPENDIX C THAT I HAVE SEEN.

4 Q. GOT IT. WHILE WE'RE IN YOUR
5 REPORT, LET'S GO TO PAGE 11. WE'RE UNDER
6 YOUR ANALYSIS AND YOU REFERENCE IN THAT
7 HEADING AN OPINION BY MR. MALKIEWICZ
8 THAT, "THE KINDS OF INFORMATION
9 GOVERNANCE PRACTICES THAT WERE APPLIED TO
10 GOOGLE CHATS IN THIS CASE ARE WIDESPREAD
11 AND GENERALLY ACCEPTED." DO YOU SEE THAT?

12 A. IS INCORRECT.

13 Q. SURE. THIS IS A SECTION WHERE
14 YOU'RE PURPORTING TO REBUT AN OPINION BY
15 MR. MALKIEWICZ, RIGHT, SIR?

16 A. YES.

17 Q. SO I'M GOING TO MARK AS THE
18 NEXT EXHIBIT 5 MR. MALKIEWICZ'S REPORT.

19 CAN YOU CONFIRM THAT EXHIBIT 5
20 IS THE REPORT OF MR. MALKIEWICZ TO WHICH
21 YOU CLAIM YOU'RE RESPONDING?

22 (GRANDE EXHIBIT 5, EXPERT
23 REPORT OF MICHAEL A. MALKIEWICZ,
24 WAS RECEIVED AND MARKED ON THIS
25 DATE FOR IDENTIFICATION.)

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 77

1 A. YES.

2 Q. SO IN YOUR REPORT, WHICH IS
3 EXHIBIT 1, YOU CITE TO MR. MALKIEWICZ'S
4 REPORT AT PARAGRAPH 21. DO YOU SEE THAT
5 IN YOUR FOOTNOTE 27?

6 A. YES.

7 Q. SO LET'S GO TO THAT PARAGRAPH
8 OF MR. MALKIEWICZ'S REPORT. LET ME KNOW
9 ONCE YOU'RE THERE. IT'S PAGE 10 OF MR.
10 MALKIEWICZ'S REPORT.

11 A. YES.

12 Q. ALL RIGHT. I WANT YOU TO LEAVE
13 EXHIBITS 5 AND 1, YOUR REPORT, HIS REPORT
14 SIDE BY SIDE.

15 IN PARAGRAPH 21, HE HAS AN
16 OPINION ON HAVING DIFFERENT RETENTION
17 PERIODS FOR DIFFERENT KINDS OF
18 COMMUNICATION BASED ON THE SUBSTANTIVE
19 BUSINESS VALUE OF THE COMMUNICATION; IS
20 THAT ACCURATE?

21 A. THAT'S PART OF THAT PARAGRAPH,
22 YES.

23 Q. WHAT ELSE IS IN THAT
24 PARAGRAPH?

25 MR. RENARD: OBJECTION TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 78

1 FORM.

2 Q. LET ME ASK A BETTER QUESTION.

3 HIS OPINION RELATES TO HAVING
4 A DIFFERENT RETENTION PRACTICE DEPENDING
5 ON THE SUBSTANTIVE BUSINESS VALUE OF THE
6 COMMUNICATION, RIGHT?

7 SORRY. WAS THAT A "YES"? I
8 SAW YOU NOD.

9 A. I HAVEN'T ANSWERED.

10 Q. OH, SORRY.

11 A. HE STATES THAT AND THEN
12 FOLLOWS BY STATING THAT HE "DISAGREES
13 THAT HE DOESN'T BELIEVE GOOGLE'S
14 INFORMATION GOVERNANCE PRACTICES ARE
15 UNUSUAL OR CANNOT BE EXPLAINED BY
16 GOOGLE'S" -- YOU KNOW, HE STATES HE
17 BELIEVES THAT THEY ARE USUAL, HE BELIEVES
18 THE OPPOSITE OF PROFESSOR HOCHSTETLER.

19 MR. RENARD: MR. GRANDE, WHEN
20 YOU ARE READING FROM A DOCUMENT
21 SOMETIMES WITNESSES TEND TO SPEED
22 UP.

23 FOR THE BENEFIT OF THE COURT
24 REPORTER, MAUREEN, JUST MAKE SURE
25 IF YOU DO THAT FROM TIME TO TIME

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 79

1 THAT YOU SPEAK SLOWLY ENOUGH THAT
2 WE CAN GET IT DOWN. THANKS.

3 Q. AND JUST TO BE CLEAR, MR.
4 GRANDE, YOU ACTUALLY WEREN'T READING FROM
5 MR. MALKIEWICZ'S REPORT JUST NOW, WERE
6 YOU?

7 A. I WAS.

8 Q. WHERE WERE YOU READING FROM?

9 A. THE SENTENCE FOLLOWING
10 FOOTNOTE 36.

11 Q. THAT SAYS THAT, "PROFESSOR
12 HOCHSTETLER SUGGESTS THROUGHOUT HIS
13 REPORT THAT GOOGLE'S INFORMATION
14 GOVERNANCE PRACTICES ARE UNUSUAL OR
15 CANNOT BE EXPLAINED BY GOOGLE'S BUSINESS
16 JUDGMENT ALONE." AND THEN HE SAYS, "AS I
17 EXPLAIN BELOW, THESE SUGGESTIONS LACK
18 BASIS BECAUSE THESE KINDS OF INFORMATION
19 GOVERNANCE PRACTICES ARE WIDESPREAD IN MY
20 EXPERIENCE." DID I READ THAT CORRECTLY?

21 A. YES.

22 Q. MR. MALKIEWICZ, IF YOU
23 CONTINUE TO LOOK AT THE FOLLOWING
24 PARAGRAPHS -- LET ME ASK THIS QUESTION:
25 CAN YOU POINT TO ME ANYWHERE IN MR.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 80

1 MALKIEWICZ'S REPORT WHERE HE SAYS THAT
2 GOOGLE'S CHAT RETENTION POLICY IS
3 GENERALLY ACCEPTED?

4 A. SORRY. CAN YOU REPEAT THE
5 QUESTION?

6 Q. SURE. CAN YOU TELL ME WHERE IN
7 MR. MALKIEWICZ'S REPORT HE OPINES THAT
8 GOOGLE'S CHAT RETENTION POLICY IS A
9 GENERALLY ACCEPTED PRACTICE?

10 A. THAT ASSERTION IS A GENERAL
11 BASIS FOR -- FOR MANY OF HIS OPINIONS. IN
12 PARTICULAR, IN -- YOU KNOW, BACK EVEN IN
13 EXAMPLE PARAGRAPH 62 HE TALKS ABOUT
14 GUIDANCE GIVEN TO EMPLOYEES REGARDING
15 GOOGLE CHAT AND THAT HE -- HIS VIEW WAS
16 THAT ALL SUCH GUIDANCE WAS FOLLOWED AND
17 THAT'S -- THAT'S IN NUMEROUS SPOTS BUT
18 PARTICULARLY IN 62.

19 Q. OKAY. LET'S GO THROUGH THAT.
20 YOU STARTED THAT ANSWER BY
21 SAYING THAT'S HIS GENERAL BASIS FOR MANY
22 OF HIS OPINIONS; THAT'S AN ASSUMPTION ON
23 YOUR PART?

24 A. NO.

25 Q. TELL ME -- OKAY. DID MR.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 81

1 MALKIEWICZ ANYWHERE IN HIS REPORT
2 SPECIFICALLY OPINE THAT GOOGLE'S CHAT
3 RETENTION POLICY IS A WIDELY ACCEPTED
4 PRACTICE -- SORRY -- GENERALLY ACCEPTED
5 PRACTICE?

6 A. BACK TO THE PARAGRAPH THAT I
7 CITE, PARAGRAPH 21, I DO BELIEVE HIS
8 STATEMENT THERE IS MORE GENERAL WITH
9 REGARD TO STATING THAT GOOGLE'S
10 INFORMATION GOVERNANCE PRACTICES ARE
11 WIDESPREAD.

12 Q. DOES HE MENTION CHAT MESSAGES
13 AT ALL?

14 A. I BELIEVE THAT'S A BASIS OF
15 THAT STATEMENT, WHEN HE TALKS ABOUT THE
16 SUBSTANTIVE BUSINESS VALUE OF DIFFERENT
17 TYPES OF COMMUNICATIONS. SO I BELIEVE
18 THAT'S THE CONTEXT FOR THAT STATEMENT.

19 Q. I UNDERSTAND. IN PARAGRAPH 21
20 DOES HE -- DOES HE SPECIFICALLY REFERENCE
21 CHAT MESSAGES OR ANY FORM OF INSTANT
22 MESSAGING?

23 A. I BELIEVE HE REFERENCES IT. IT
24 DOESN'T STATE CHAT MESSAGES IN THAT
25 PARAGRAPH BUT I BELIEVE THAT IS PART -- I

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 82

1 READ THAT TO BE PART OF THAT STATEMENT
2 THAT WHEN HE SPEAKS ABOUT DIFFERENT TYPES
3 OF COMMUNICATION.

4 Q. SO THAT'S HOW YOU READ IT?

5 A. THAT'S CORRECT.

6 Q. OKAY.

7 A. I THINK IT'S PRETTY CLEAR.

8 MS. NAJAM: I'LL OBJECT AS
9 NONRESPONSIVE.

10 Q. SIR, IN TERMS OF THE ASPECT OF
11 GOOGLE'S CHAT RETENTION POLICY THAT YOU
12 WERE -- THAT YOU ARE OPINING ON, AM I
13 RIGHT THAT THE ASPECT OF THE POLICY THAT
14 YOU'RE OPINING ON IS THE DEFAULT FOR
15 HISTORY BEING OFF? I'LL START THERE.
16 THAT'S PART OF IT, RIGHT? YOU'RE
17 CRITICAL OF THE USE OF A SYSTEM WHERE THE
18 DEFAULT WAS SET TO OFF, RIGHT, SIR?

19 A. THAT'S PART OF IT.

20 Q. AND ANOTHER PART OF IT IS THAT
21 IF THE DEFAULT WAS OFF, THEN THE MESSAGE
22 WAS NOT AVAILABLE TO BE PRESERVED
23 INVOLVED, RIGHT, THAT'S ANOTHER ASPECT?

24 A. YES.

25 Q. OKAY. AND ANOTHER ASPECT THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 83

1 YOU ARE OPINING ON IS THAT EVEN IF
2 SOMEBODY WAS SUBJECT TO A LITIGATION
3 HOLD, THEY HAD THE PHYSICAL ABILITY TO
4 SEND "OFF THE RECORD" CHATS BY LEAVING
5 "HISTORY OFF"; DID I RECAP THAT
6 ACCURATELY?

7 A. BY LEAVING "HISTORY OFF" OR
8 TURNING "HISTORY OFF".

9 Q. OKAY. DID MR. MALKIEWICZ
10 ANYWHERE IN HIS REPORT SPECIFICALLY OPINE
11 THAT ANY OF THOSE ASPECTS WERE, IN HIS
12 VIEW, GENERALLY ACCEPTED IN ANY INDUSTRY?

13 MR. RENARD: OBJECTION TO
14 FORM.

15 A. MR. MALKIEWICZ PRESENTED BROAD
16 OPINIONS THAT I BELIEVE DID -- DID
17 SUGGEST THAT THOSE PRACTICES WERE
18 ACCEPTABLE IN VARIOUS INDUSTRIES.

19 Q. CAN YOU POINT ME TO WHERE HE
20 SPECIFICALLY SET FORTH ANY OF THOSE
21 OPINIONS IN HIS ACTUAL REPORT?

22 A. GIVE ME ONE SECOND.
23 (DEPONENT REVIEWS THE
24 DOCUMENT.)

25 A. CAN YOU REASK THE QUESTION,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 84

1 PLEASE?

2 Q. I ASKED WHETHER YOU CAN POINT
3 TO ME WHERE MR. MALKIEWICZ SPECIFICALLY
4 SET FORTH ANY OF THOSE OPINIONS IN HIS
5 ACTUAL REPORT AND THAT WAS WHETHER ANY OF
6 THE THREE ASPECTS OF GOOGLE'S CHAT
7 RETENTION POLICY WAS GENERALLY ACCEPTED
8 IN ANY INDUSTRY?

9 A. I BELIEVE I GENERALLY ANSWERED
10 THIS ALREADY IN THAT UNDER PARAGRAPH 21
11 HE MAKES A GENERAL OPINION THAT GOOGLE'S
12 INFORMATION GOVERNANCE PRACTICES ARE
13 WIDESPREAD IN MY EXPERIENCE, HE DOESN'T
14 LIMIT THAT TO EMAILS OR CERTAIN TYPES OF
15 COMMUNICATION.

16 OTHER AREAS OF HIS REPORT HE
17 INDICATES THAT HE BELIEVED THAT GOOGLE
18 EMPLOYEES FOLLOWED ALL INSTRUCTIONS THEY
19 WERE PROVIDED WITH AND THAT'S -- YEAH,
20 THAT'S THE BASIS OF HIS -- ANYWAY, I
21 BELIEVE THAT ANSWERS YOUR QUESTION.

22 Q. AND YOU POINTED ME TO
23 PARAGRAPH -- YOU POINTED ME TO PARAGRAPH
24 21. WAS THAT SECOND THING YOU REFERENCED
25 IN TERMS OF GOOGLE EMPLOYEES FOLLOWING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 85

1 INSTRUCTIONS, WAS THAT PARAGRAPH 62
2 AGAIN?

3 A. 10.J, ALSO 62 WAS ANOTHER.

4 Q. OKAY. LET'S LOOK AT 10.J OF
5 MR. MALKIEWICZ'S REPORT, EXHIBIT 5.

6 YOUR TESTIMONY IS THAT 10.J
7 OFFERS AN OPINION BY HIM ON GOOGLE'S CHAT
8 RETENTION POLICY BEING GENERALLY ACCEPTED
9 IN THE INDUSTRY; IS THAT WHAT I HEAR YOU
10 SAYING?

11 MR. RENARD: OBJECTION TO
12 FORM.

13 A. THAT'S NOT WHAT I SAID.

14 Q. I WAS LOOKING FOR EXAMPLES --
15 I WANTED YOU TO POINT ME WHERE IN HIS
16 REPORT DOES HE SAY THAT ANY OF THOSE
17 THREE ASPECTS OF GOOGLE'S CHAT RETENTION
18 POLICY ARE GENERALLY ACCEPTED IN ANY
19 INDUSTRY --

20 A. AGAIN --

21 Q. SORRY. LET ME FINISH MY
22 QUESTION. 10.J THAT IS NOT AN INSTANCE,
23 IS IT?

24 A. AS I ALREADY ANSWERED, HE
25 STATES UNDER PARAGRAPH 21 A BROAD

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 86

1 STATEMENT, A BROAD OPINION THAT THESE
2 KINDS OF INFORMATION GOVERNANCE PRACTICES
3 THAT GOOGLE HAS IN PLACE ARE WIDESPREAD
4 IN MY EXPERIENCE.

5 I BELIEVE, YOU KNOW, THERE'S
6 OTHER PORTIONS OF HIS OPINION -- I
7 BELIEVE THAT, IN AND OF ITSELF, COVERS
8 WHAT YOU ARE ASKING BUT HE HAS OTHER
9 STATEMENTS THROUGHOUT HIS REPORT THAT --
10 THAT ALSO ADDRESS HIS BELIEF THAT
11 GOOGLE'S PRACTICES WERE USUAL AND
12 SUFFICIENT AND FOLLOWED.

13 Q. OKAY. TELL ME WHERE ELSE
14 BESIDES PARAGRAPH 21 YOU BELIEVE MR.
15 MALKIEWICZ IS OPINING THAT GOOGLE'S CHAT
16 RETENTION POLICY, NOT OTHER PRACTICES,
17 THE THREE ASPECTS WE TALKED ABOUT, WERE
18 GENERALLY ACCEPTED?

19 SO FAR I GOT PARAGRAPH 21. ARE
20 THERE ANY OTHERS?

21 MR. RENARD: OBJECTION TO
22 FORM.

23 A. FOR THAT STATEMENT, YEAH, I
24 BELIEVE PARAGRAPH 21 IS THE BEST LOCATION
25 WHERE HE TALKS ABOUT THAT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 87

1 Q. OKAY. AND, SIR, FOR THE LAST
2 FEW MINUTES, ACTUALLY THE LAST SIX
3 MINUTES, YOU'VE BEEN FLIPPING THROUGH MR.
4 MALKIEWICZ'S REPORT, RIGHT?

5 MR. RENARD: OBJECTION TO
6 FORM.

7 A. I DON'T KNOW HOW LONG I WAS
8 LOOKING AT IT.

9 Q. FOR THE LAST SEVERAL MINUTES I
10 LET YOU TAKE YOUR TIME WITH THE REPORT,
11 RIGHT? RIGHT, SIR?

12 A. YES.

13 Q. DOES MR. MALKIEWICZ -- LET ME
14 ASK A BETTER QUESTION.

15 CAN YOU POINT ME TO ANYWHERE
16 IN HIS REPORT WHERE HE DISCUSSES
17 EDISCOVERY STANDARDS?

18 SO THERE IS NO DISPUTE LATER,
19 I WILL PUT THE TIME ON THE RECORD. IT IS
20 11:09.

21 A. I BELIEVE THAT SEVERAL OF HIS
22 OPINIONS IMPLICATE EDISCOVERY STANDARDS.
23 HE DOES NOT MENTION EDISCOVERY STANDARDS
24 AS A QUOTE IN HIS REPORT. BUT I WOULD
25 MENTION THAT IN PARAGRAPH 23 HE DOES

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 88

1 REFERENCE THE SEDONA CONFERENCE AND
2 INFORMATION GOVERNANCE STANDARDS IN
3 SUPPORTING HIS CONCLUSIONS.

4 Q. ALL RIGHT. BESIDES REFERENCING
5 SEDONA IN PARAGRAPH 23, ARE THERE ANY
6 OTHER MENTIONS IN HIS REPORT OF WHAT YOU
7 BELIEVE TO BE AN EDISCOVERY STANDARD?

8 A. MR. MALKIEWICZ IN HIS REPORT
9 DOES NOT, AS FAR AS I'M AWARE, DOES NOT
10 MENTION EDISCOVERY STANDARDS, BUT THE
11 OPINIONS WHICH I LIST IN MY REBUTTAL
12 REPORT I BELIEVE ALL IMPLICATE EDISCOVERY
13 STANDARDS.

14 Q. OKAY. FAIR ENOUGH. MR.
15 MALKIEWICZ DOES NOT OPINE, DOES HE, THAT
16 GOOGLE'S CHAT RETENTION POLICY WAS INLINE
17 WITH EDISCOVERY STANDARDS, DOES HE?

18 MR. RENARD: OBJECTION TO
19 FORM.

20 A. CAN YOU REPEAT YOUR QUESTION?

21 Q. LET'S LOOK AT PARAGRAPH 23 TO
22 MR. MALKIEWICZ'S REPORT. IT'S ON PAGE 11.
23 ARE YOU ALREADY THERE?

24 A. YES.

25 Q. THERE IN THAT PARAGRAPH HE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 89

1 OPINES THAT, "IT IS NORMAL AND SENSIBLE
2 FOR COMPANIES TO HAVE DATA MANAGEMENT
3 POLICIES THAT PERMIT ROUTINE DELETION OF
4 DATA." DID I READ THAT CORRECTLY?

5 A. YES.

6 Q. AND THAT IS THE CONTEXT IN
7 WHICH HE CITES TWO VOLUMES ISSUED BY THE
8 SEDONA CONFERENCE. DO YOU SEE THAT?

9 A. YES.

10 Q. BESIDES THAT OPINION, THAT
11 IT'S NORMAL FOR COMPANIES TO ROUTINELY --
12 TO HAVE DATA MANAGEMENT POLICIES THAT
13 PERMIT THE ROUTINE DELETION OF DATA, DOES
14 HE HAVE ANY OTHER OPINION THAT YOU CAN
15 POINT US TO ALONG THE LINES OF GOOGLE'S
16 CHAT RETENTION POLICY, IT WAS CONSISTENT
17 WITH INDUSTRY STANDARDS?

18 A. YES, PARAGRAPH 21 IF I CAN
19 QUOTE AGAIN, STATES, YOU KNOW, IT
20 DISCUSSES -- STATES, "THESE KIND OF
21 INFORMATION GOVERNANCE PRACTICES ARE
22 WIDESPREAD IN MY EXPERIENCE".

23 WHILE HE DOESN'T SPECIFICALLY
24 LIST CHATS IN THAT STATEMENT, HIS WHOLE
25 REPORT IS ABOUT CHATS, THE PRESERVATION

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 90

1 OF CHATS, THE CALCULATION OF THE NUMBER
2 OF CHATS. HE DOESN'T TALK ABOUT ANY OTHER
3 FORMS OF COMMUNICATION.

4 SO, YOU KNOW, AGAIN, THAT
5 STATEMENT I BELIEVE STATES THAT HE
6 BELIEVED THE INFORMATION GOVERNANCE
7 PRACTICES IN PLACE AT GOOGLE WERE
8 WIDESPREAD.

9 Q. SORRY. DOES HE -- YOU WEREN'T
10 READING FROM HIS REPORT JUST THEN WHEN
11 YOU -- WHEN YOU SAID, "THE INFORMATION
12 GOVERNANCE PRACTICES AT GOOGLE IN PLACE
13 AT GOOGLE", HE DOESN'T SAY THAT IN THAT
14 PARAGRAPH, DOES HE?

15 A. HE SAYS "THESE KINDS OF
16 INFORMATION GOVERNANCE PRACTICES ARE
17 WIDESPREAD."

18 Q. AND "THESE KINDS" FALLS IN A
19 SENTENCE THAT IS PRECEDED BY HIS
20 DISCUSSION OF HAVING DIFFERENT RETENTION
21 PERIODS FOR COMMUNICATION BASED ON THE
22 SUBSTANTIVE BUSINESS VALUE OF THE
23 COMMUNICATION, RIGHT, SIR?

24 MR. RENARD: OBJECTION TO
25 FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 91

1 A. THAT'S CORRECT. AND AGAIN, IF
2 I CAN CLARIFY WHEN HE SPEAKING ABOUT
3 "SUBSTANTIVE BUSINESS VALUE OF DIFFERENT
4 TYPES OF COMMUNICATIONS", I BELIEVE HE'S
5 STATING THAT HE BELIEVES CHATS HAVE NO
6 SUBSTANTIVE BUSINESS VALUE AND,
7 THEREFORE, CAN BE NOT PRESERVED.

8 Q. THAT'S YOUR BELIEF, IT'S NOT
9 STATED IN THAT PARAGRAPH WHAT YOU JUST
10 SAID?

11 A. NO, BUT IT'S GOOGLE'S POLICY.

12 Q. OKAY. JUST TO BE CLEAR, YOU
13 TOOK FROM MR. MALKIEWICZ'S COMMENT ABOUT
14 FOLKS HAVING DIFFERENT PERIODS OF
15 RETENTION DEPENDING ON THE SUBSTANTIVE
16 BUSINESS VALUE, YOU TOOK THAT TO MEAN
17 THAT HE IS STATING HE THINKS CHATS HAVE
18 NO BUSINESS VALUE? WAS THAT AN ACCURATE
19 RECAP?

20 MR. RENARD: OBJECTION TO
21 FORM.

22 A. JUST TO GIVE THE FULL CONTEXT
23 OF THAT STATEMENT, THE PRIOR SENTENCE HE
24 QUOTES, " [REDACTED] , A GOOGLE
25 EMPLOYEE, STATED" -- HE NOTES "ACCOUNTED

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 92

1 FOR THE SUBSTANTIVE BUSINESS VALUE OF
2 DIFFERENT TYPES OF COMMUNICATIONS IN
3 ESTABLISHING DIFFERENT POLICY TREATMENT
4 FOR DIFFERENT MEANS OF COMMUNICATION. "

5 Q. RIGHT. THAT'S WHAT MR.
6 MALKIEWICZ ACTUALLY SAID. THAT WAS
7 READING FROM HIS REPORT, RIGHT?

8 A. CORRECT.

9 Q. OKAY. LET ME ASK YOU THIS, GO
10 BACK TO YOUR REPORT, PARAGRAPH 53 --
11 PERHAPS WE CAN DO THIS WITHOUT LOOKING AT
12 YOUR REPORT.

13 IS IT YOUR OPINION THAT CHAT
14 MESSAGES ARE JUST AS LIKELY TO BE
15 RELEVANT TO LITIGATION AS OTHER FORMS OF
16 COMMUNICATION?

17 A. YES.

18 Q. AND IN PARAGRAPH 53, SO THAT'S
19 PAGE 11 OF YOUR REPORT, YOU DON'T CITE TO
20 ANYTHING, DO YOU, SIR?

21 A. NOT IN THAT PARTICULAR
22 PARAGRAPH.

23 Q. ARE YOU GOING BY YOUR
24 EXPERIENCE HERE OR CAN YOU CITE TO SOME
25 AUTHORITY FOR THIS PROPOSITION?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 93

1 A. I BELIEVE THAT PROPOSITION IS
2 PRETTY UNIVERSALLY ADOPTED. SO, YOU KNOW,
3 IF -- THAT'S WHY I DID NOT HAVE A
4 PARTICULAR CITATION THERE.

5 Q. CAN YOU NAME FOR ME ONE
6 INDUSTRY AUTHORITY IN YOUR VIEW THAT HAS
7 ACTUALLY ADOPTED THIS WHAT YOU CALL
8 UNIVERSALLY ADOPTED PROPOSITION?

9 A. THE FTC.

10 Q. SO IT'S YOUR TESTIMONY THAT
11 THE FTC HAS STATED THAT CHAT MESSAGES ARE
12 AS LIKELY TO BE RELEVANT TO LITIGATION AS
13 OTHER FORMS OF COMMUNICATION?

14 A. I THINK IN THEIR STATEMENT
15 THEY MADE REFERENCE TO INVESTIGATIONS BUT
16 MAY ALSO REFERENCE LITIGATION.

17 Q. I JUST WANT TO MAKE SURE YOU
18 AGAIN ARE ANSWERING MY QUESTION.

19 IS IT YOUR TESTIMONY THAT THE
20 FTC HAS STATED CHAT MESSAGES ARE AS
21 LIKELY TO BE RELEVANT TO LITIGATION AS
22 OTHER FORMS OF COMMUNICATION -- JUST AS
23 LIKELY? SORRY.

24 A. IT'S NOT A QUOTE. YOU KNOW,
25 THAT'S NOT A QUOTE WITHOUT A -- BUT I

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 94

1 BELIEVE THAT STATEMENT IS SUPPORTED ,
2 AGAIN , BY WHAT I FOUND TO BE INDUSTRY
3 STANDARDS AND PRACTICES INCLUDING THE
4 SEDONA CONFERENCE , OTHER TREATISES .

5 Q . THAT IS MY QUESTION . IS IT
6 YOUR TESTIMONY THAT THE SEDONA CONFERENCE
7 HAS TAKEN THE POSITION , THIS GENERALIZED
8 STATEMENT , THAT CHATS SENT THROUGH
9 WORK-SANCTIONED PLATFORMS CONTAIN
10 COMMUNICATIONS THAT ARE JUST AS LIKELY TO
11 BE RELEVANT TO LITIGATION AS ANY FORM OF
12 COMMUNICATION ?

13 MR . RENARD : OBJECT TO THE
14 FORM OF THE QUESTION .

15 A . I WOULD SAY THAT THIS
16 PARAGRAPH IS -- IS BASED UPON MY MORE
17 THAN 20 YEARS OF EXPERIENCE IN THE
18 EDISCOVERY INDUSTRY AND I DO BELIEVE IS
19 SUPPORTED BY STANDARDS AND PRACTICES
20 THROUGHOUT THE INDUSTRY WITH REGARD TO
21 WHATEVER THE FORM OF COMMUNICATION , IT
22 SHOULD BE TREATED THE SAME AS ANY OTHER
23 FORM OF COMMUNICATION .

24 MS . NAJAM : I 'LL OBJECT AS
25 NONRESPONSIVE . LET 'S GO BACKWARDS .

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 95

1 Q. TELL ME WHEN THE FTC TOOK THE
2 POSITION THAT CHAT MESSAGES SENT THROUGH
3 INSTANT MESSAGING AT WORK ARE JUST AS
4 LIKELY TO BE RELEVANT TO LITIGATION AS
5 OTHER FORMS OF COMMUNICATION? ARE YOU
6 ABLE TO GIVE ME A DATE?

7 MR. RENARD: OBJECTION TO THE
8 FORM OF THE QUESTION.

9 A. EARLIER IN 2024 THE FTC ISSUED
10 GUIDANCE THAT COMPANIES SHOULD BE
11 PRESERVING CHATS, TEXT MESSAGES AND
12 SHOULD HAVE ALWAYS BEEN PRESERVING SUCH
13 DOCUMENTS.

14 Q. BECAUSE IT CAN CONTAIN --

15 MR. RENARD: SORRY. WERE YOU
16 FINISHED WITH YOUR ANSWER? I JUST
17 WANT TO MAKE SURE.

18 THE WITNESS: YES.

19 Q. BECAUSE THEY CAN CONTAIN
20 RELEVANT INFORMATION, RIGHT?

21 A. I'D HAVE TO LOOK TO SEE THE
22 LANGUAGE IN THAT.

23 Q. OKAY. SO WHAT YOU JUST QUOTED
24 ME -- I'M GOING TO GO BACK TO MY
25 QUESTION.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 96

1 WHEN YOU ARE TAKING THE
2 POSITION THAT YOU ARE IN PARAGRAPH 53 OF
3 YOUR REPORT, FIRST YOUR REPORT CITES
4 NOTHING, RIGHT?

5 MR. RENARD: OBJECTION TO THE
6 FORM.

7 A. I HAVE CITATIONS THROUGHOUT MY
8 REPORT, BUT THAT PARAGRAPH DOES NOT HAVE
9 THE SPECIFIC FOOTNOTE, CORRECT.

10 Q. OKAY. AND YOU SAID YOU WERE
11 GOING ON EXPERIENCE AND WE COVERED THAT.

12 SITTING HERE TODAY, AND I'VE
13 ASKED THIS A FEW TIMES AND I UNDERSTAND,
14 CAN YOU POINT US TO ANY SPECIFIC INDUSTRY
15 PUBLICATION OR GUIDANCE THAT LITERALLY
16 SAYS THAT ANY PARTICULAR CHAT ON A WORK
17 PLATFORM IS JUST AS LIKELY TO BE RELEVANT
18 TO LITIGATION AS OTHER FORMS OF
19 COMMUNICATIONS?

20 MR. RENARD: OBJECTION TO
21 FORM.

22 Q. OR IS THAT SOMETHING YOU'RE
23 GLEANNING FROM INDUSTRY STANDARDS?

24 MR. RENARD: NOW I'M REALLY
25 OBJECTING TO THE FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 97

1 Q. NOW HE'S REALLY OBJECTING, SO
2 I'LL ASK IT AGAIN.

3 MR. RENARD: WHAT QUESTION DO
4 YOU WANT ANSWERED?

5 Q. IS IT FAIR TO SAY THAT FOR
6 PARAGRAPH 53 THIS IS YOUR OPINION BASED
7 ON INDUSTRY STANDARDS. EVEN THOUGH THEY
8 DON'T SPECIFICALLY STATE IT?

9 MR. RENARD: OBJECTION TO THE
10 FORM.

11 Q. TELL YOU WHAT -- GO AHEAD.

12 A. AS I RECALL, SEDONA, OTHER
13 COMMUNICATIONS DO INDICATE THAT CHATS
14 CAN -- YOU KNOW, ARE LIKELY TO CONTAIN
15 RELEVANT FORMS OF COMMUNICATION.

16 Q. JUST AS LIKELY? SORRY. THAT'S
17 WHAT YOU WROTE, RIGHT, IN YOUR REPORT?

18 A. YES. AND I BELIEVE THAT --
19 AND I BELIEVE THAT BASED ON THE STANDARDS
20 AND PRACTICES. I CAN'T POINT YOU IF THAT
21 EXACT LANGUAGE IS IN SOME DOCUMENT BUT IN
22 MY EXPERIENCE I FOUND OFTENTIMES THE MOST
23 RELEVANT DOCUMENTS IN A CASE ARE A CHAT
24 OR A TEXT MESSAGE THAT WAS PRODUCED.

25 Q. AND IN YOUR EXPERIENCE -- SO

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Page 98

1 ONE OF THE BENEFITS YOU HAVE AS AN
2 EDISCOVERY CONSULTANT IS THAT YOU GET TO
3 VIEW ALL THE DOCUMENTS COLLECTED BEFORE
4 THE DECISIONS ARE MADE ON WHETHER THEY'RE
5 PRODUCED, TRUE?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. I DON'T ALWAYS SEE ALL THE
9 DOCUMENTS.

10 Q. BUT AS AN EDISCOVERY
11 CONSULTANT I TAKE IT YOUR TEAM IS OFTEN
12 ENGAGED AT THE COLLECTION PHASE; IS THAT
13 ACCURATE?

14 A. SOMETIMES.

15 Q. HAVE YOU EVER PERFORMED ANY
16 QUANTITATIVE STUDY TO DETERMINE WHETHER
17 IT'S TRUE THAT A CHAT ON A WORK PLATFORM
18 IS STATISTICALLY SHOWN TO BE JUST AS
19 LIKELY RELEVANT AS OTHER FORMS OF
20 COMMUNICATION?

21 A. WHILE I HAVEN'T PERFORMED A
22 SURVEY ON THAT POINT, I HAVE BEEN
23 INVOLVED WITH SEVERAL CASES WHERE CHATS
24 OR INSTANT MESSAGES HAVE BEEN THE
25 DOCUMENTS THAT WERE HAPPENED -- THAT WERE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 99

1 MORE RELEVANT TO A LITIGATION OR
2 INVESTIGATION THAT I WAS INVOLVED WITH.

3 Q. BUT THE ANSWER TO MY QUESTION
4 IS NO, YOU'VE NOT PERFORMED A
5 QUANTITATIVE DETERMINATION, TRUE?

6 A. THAT'S TRUE.

7 Q. AND HAVE YOU EVER DONE A
8 DETERMINATION ON THE EFFECT OF WHEN FOLKS
9 ON LITIGATION HOLD ARE INSTRUCTED TO NOT
10 USE A CHAT TOOL TO DISCUSS MATTERS THAT
11 ARE THE SUBJECT OF THE HOLD, WHETHER THAT
12 HAS ANY IMPACT ON WHETHER SUBSEQUENT
13 CHATS ARE JUST AS LIKELY TO BE RELEVANT
14 AS, SAY, EMAILS?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. CAN YOU REPHRASE YOUR
18 QUESTION?

19 Q. I'LL ASK ANOTHER QUESTION.
20 YOU ARE AWARE THAT IN THIS
21 CASE GOOGLE ISSUED A LITIGATION HOLD,
22 RIGHT?

23 A. YES.

24 Q. WHEN I SAY "IN THIS CASE" I'M
25 TALKING ABOUT -- WE'RE GOING TO BACK UP

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 100

1 FURTHER .

2 YOU'RE AWARE IN SEPTEMBER OF
3 2019 A CIVIL INVESTIGATION -- OR IS IT
4 INVESTIGATIVE? -- DEMAND WAS ISSUED BY
5 THE TEXAS OFFICE OF ATTORNEY GENERAL ,
6 YOU'RE AWARE?

7 A. YES .

8 Q. AND YOU ARE AWARE THAT
9 SUBSEQUENT TO THAT GOOGLE ISSUED VARIOUS
10 NOTICES PUTTING EMPLOYEES ON LITIGATION
11 HOLD IN THE WAKE OF WHAT I'M GOING TO
12 CALL IT THE CID , RIGHT , SIR?

13 A. YES .

14 Q. IN FACT , YOU REVIEWED SOME OF
15 THE LANGUAGE THAT WAS CONTAINED IN SOME
16 OF THOSE NOTICES , RIGHT?

17 A. I DID SEE SOME OF THE
18 LANGUAGE .

19 Q. IS IT YOUR OPINION THAT AN
20 EMPLOYEE READING THOSE LITIGATION HOLDS
21 -- SORRY , I GOT TO BACK UP FURTHER .

22 YOU'RE AWARE THAT ONE OF THE
23 INSTRUCTIONS IN THOSE HOLDS WAS FOR FOLKS
24 TO AVOID USING GOOGLE CHAT TO TALK ABOUT
25 MATTERS RELEVANT TO THAT INVESTIGATION ,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 101

1 RIGHT, SIR?

2 A. I RECALL LANGUAGE TO THAT
3 EFFECT, YES.

4 Q. ARE YOU OFFERING AN EXPERT
5 OPINION THAT EMPLOYEES READING THOSE
6 HOLDS JUST DIDN'T ABIDE BY THEM?

7 JUST FOR THE RECORD, ARE YOU
8 READING THE TABLE OF CONTENTS OF YOUR
9 REPORT NOW?

10 A. I AM.

11 Q. CAN YOU ANSWER MY QUESTION
12 WITHOUT REFERENCING YOUR REPORT?

13 MR. RENARD: OBJECTION TO
14 FORM.

15 A. CAN YOU REPEAT YOUR QUESTION
16 AGAIN?

17 Q. DO YOU HAVE AN EXPERT OPINION
18 ON WHETHER PEOPLE READING THOSE
19 LITIGATION HOLD INSTRUCTIONS DECIDED; YOU
20 KNOW WHAT, I'M NOT GOING TO FOLLOW THESE?

21 A. I DON'T RECALL THE OPINION IN
22 MY REPORT, YOU KNOW, THE EXACT MEANING
23 THAT'S WHAT I WAS LOOKING FOR, BUT MY
24 FINDINGS IN THIS CASE SHOWED THAT
25 EMPLOYEES DID NOT FOLLOW THOSE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 102

1 INSTRUCTIONS.

2 Q. OKAY. AND MORE SPECIFICALLY,
3 HAVE YOU FOUND -- OKAY. AND WHEN YOU SAY
4 THE FINDINGS IN YOUR CASE, YOU'RE TALKING
5 ABOUT THE FACT THAT PEOPLE USED CHAT TO
6 TALK ABOUT ADVERTISING TECHNOLOGY; IS
7 THAT WHAT YOU'RE REFERRING TO?

8 A. IN PART.

9 Q. OKAY. AND THAT WAS -- YOUR
10 OPINION ON THAT FRONT, THAT'S JUST BASED
11 ON LOOKING AT DOCUMENTS, IS THAT
12 ACCURATE, PRODUCED DOCUMENTS?

13 A. DOCUMENTS AND DEPOSITION
14 TRANSCRIPTS.

15 Q. OKAY. YOU'RE NOT APPLYING SOME
16 KIND OF EDISCOVERY EXPERTISE TO MAKE THAT
17 DETERMINATION, ARE YOU?

18 MR. RENARD: OBJECTION TO
19 FORM.

20 A. TO MAKE WHAT DETERMINATION?

21 Q. YOUR DETERMINATION THAT FOLKS
22 DIDN'T ABIDE BY THE INSTRUCTIONS AND THE
23 HOLDS?

24 MR. RENARD: OBJECTION TO
25 FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 103

1 A. ANY STATEMENTS , ANY OPINION I
2 HAVE THERE IS INFORMED BY EDISCOVERY
3 STANDARDS AND PRACTICES AND TRAINING THAT
4 EMPLOYEES SHOULD RECEIVE --

5 Q. OKAY.

6 A. -- AND GUIDANCE.

7 MS. NAJAM: I'LL OBJECT TO
8 THAT AS NONRESPONSIVE BUT I'M GOING
9 TO MOVE ON.

10 Q. YOUR OPINION IS THAT CHAT
11 MESSAGES ARE JUST AS LIKELY TO CONTAIN
12 RELEVANT INFORMATION AS OTHER FORMS OF
13 COMMUNICATIONS. DOES THAT HOLD TRUE
14 WHETHER THE PARTY IS A PLAINTIFF OR A
15 DEFENDANT?

16 DO YOU NEED ME TO TAKE YOU
17 BACK TO WHERE I GOT THE OPINION FROM IN
18 -- IT'S PARAGRAPH 53?

19 A. 53 , YEAH.

20 Q. IS YOUR OPINION TRUE FOR
21 PLAINTIFFS AND DEFENDANTS?

22 A. YES.

23 Q. OKAY. IN THE NEXT PARAGRAPH 54
24 YOU SAY THAT, "IT IS NOT INDUSTRY
25 PRACTICE TO HAVE A DEFAULT OF 'HISTORY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 104

1 OFF ' " ; IS THAT CORRECT?

2 MR. RENARD: OBJECTION, FORM.

3 A. YES, THAT'S MY OPINION.

4 Q. OKAY. WE'VE COVERED YOUR
5 EXPERIENCE OF MAYBE A COUPLE OF SAAS OR
6 TECH COMPANIES THAT YOU'VE BEEN INVOLVED
7 IN ADVISING.

8 IS IT FAIR TO SAY THAT YOU
9 DON'T HAVE AN OPINION ON WHETHER THIS
10 PARTICULAR PRACTICE OF "HISTORY OFF"
11 BEING THE DEFAULT FOR AN INSTANT
12 MESSAGING TOOL, THAT YOU DON'T HAVE AN
13 OPINION ON HOW COMMON THAT IS AMONGST
14 TECH COMPANIES, TRUE?

15 A. I HAVE AN OPINION ON HOW
16 COMMON IT IS AMONG COMPANIES, IN GENERAL.

17 Q. BUT DO YOU HAVE ANY EXPERTISE
18 AS TO WHAT THE TREND IS WITHIN TECH
19 COMPANIES FOR ANY PARTICULAR TIME?

20 MR. RENARD: OBJECTION TO
21 FORM.

22 A. I DON'T BELIEVE THAT'S
23 RELEVANT.

24 Q. DO YOU HAVE AN OPINION?

25 A. ON WHAT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 105

1 Q. ON WHAT THE GENERAL PRACTICE
2 WAS AT ANY GIVEN POINT FOR TECH COMPANIES
3 IN PARTICULAR AS IT PERTAINS TO WHAT THE
4 DEFAULT IS FOR THE IM SYSTEM THEY'RE
5 USING?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. MY OPINION IS THIS IS
9 GENERALLY NOT INDUSTRY PRACTICE ACROSS
10 ALL COMPANIES. I DON'T HAVE AN OPINION
11 SPECIFICALLY WITH REGARD TO THE TECH
12 INDUSTRY.

13 Q. AND YOU SAID THAT YOU DON'T
14 THINK IT'S RELEVANT WHAT INDUSTRY WE'RE
15 TALKING ABOUT? DID I HEAR THAT CORRECTLY?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 Q. DO YOU THINK IT IS RELEVANT
19 WHAT INDUSTRY THE PARTICULAR COMPANY IS
20 IN WHEN IT COMES TO THIS TOPIC?

21 A. THERE ARE CERTAIN INDUSTRIES
22 THAT HAVE ADDITIONAL REQUIREMENTS THAT
23 APPLY, BUT THE TECH INDUSTRY IS NOT ONE
24 OF THOSE INDUSTRIES WHERE IT WOULD BE
25 DIFFERENT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 106

1 Q. BUT LET'S -- OBJECT AS
2 NONRESPONSIVE.

3 SIR, WITHIN PARTICULAR
4 INDUSTRIES THERE ARE CERTAIN REGULATORY
5 REQUIREMENTS THAT PERTAIN JUST TO THAT
6 INDUSTRY FOR WHAT ESI TO RETAIN, RIGHT?

7 A. FOR CERTAIN INDUSTRIES.

8 Q. FOR EXAMPLE, FOR THE FINANCIAL
9 INDUSTRY THERE IS SOMETHING CALLED FINRA,
10 RIGHT, F-I-N-R-A?

11 A. THAT'S CORRECT.

12 Q. WHAT IS A FINRA REGULATED
13 ENTITY? WHAT DOES THAT MEAN?

14 MR. RENARD: OBJECTION TO
15 FORM.

16 A. THERE ARE DIFFERENT
17 REGULATIONS BUT, YOU KNOW, FOR FINANCIAL
18 INSTITUTIONS THAT HAVE BROKER-DEALERS,
19 THERE ARE CERTAIN REGULATORY
20 REQUIREMENTS.

21 Q. SIR, AND ADDITIONAL
22 REQUIREMENTS HAVING TO DO WITH ESI
23 PRESERVATION AND INSTRUCTION, RIGHT, SIR?

24 A. WITH REGARD TO PRESERVATION,
25 YES.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 107

1 Q. AND LIKE THE HEALTHCARE
2 INDUSTRY, THEY, FOR EXAMPLE, ARE SUBJECT
3 TO HIPAA, RIGHT, H-I-P-A-A?

4 A. THAT'S CORRECT.

5 Q. AND THAT HAS ITS OWN SET OF
6 REGULATIONS ABOUT WHAT HOW AND WHEN AND
7 TO WHAT EXTENT CERTAIN ESI IS KEPT,
8 RIGHT?

9 A. YES.

10 Q. SO IT DOESN'T MATTER WHAT
11 INDUSTRY YOU'RE IN, DOESN'T IT, WHEN YOU
12 WERE DETERMINING A PARTICULAR COMPANY'S
13 RETENTION PRACTICES WHEN IT COMES TO ESI?

14 A. NO. YOU'VE MENTIONED THE TWO
15 INDUSTRIES WHERE THERE ARE ADDITIONAL
16 SUBSTANTIAL REQUIREMENTS. THE TECH
17 INDUSTRY IS NOT ONE OF THEM.

18 Q. OKAY. SO LET'S GET BACK TO
19 WHERE WE VEERED OFF THIS PATH.

20 THE PRACTICE OF USING A
21 DEFAULT OF "HISTORY OFF", THAT IS
22 MESSAGES NOT BEING SAVED, IS IT YOUR
23 OPINION THAT IT'S UNUSUAL NO MATTER WHAT
24 THE INDUSTRY?

25 MR. RENARD: I'LL OBJECT TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 108

1 THE STATEMENT THAT PRECEDED THE
2 ACTUAL QUESTION.

3 A. CAN YOU RESTATE?

4 Q. THE PRACTICE OF USING A
5 DEFAULT OF "HISTORY OFF", THAT IS
6 MESSAGES NOT BEING SAVED, IS IT YOUR
7 OPINION THAT IT'S UNUSUAL NO MATTER WHAT
8 THE INDUSTRY?

9 A. I WOULDN'T SAY "HISTORY OFF"
10 MEANS DOCUMENTS NOT BEING SAVED. YOU
11 KNOW, THE POINT IS "HISTORY OFF" MEANS
12 THEY CAN NEVER BE RETAINED. SO I DO THINK
13 HAVING THAT SETTING IN PLACE IS UNUSUAL
14 IN THE INDUSTRY.

15 Q. OKAY. BUT TO RECAP, YOU DON'T
16 HAVE ANY EXPERTISE ON THIS PARTICULAR
17 PRACTICE AMONGST TECH COMPANIES; IS THAT
18 ACCURATE?

19 A. AMONG COMPANIES IN GENERAL BUT
20 NOT JUST WITHIN TECH COMPANIES.

21 Q. I'M ASKING IF YOU HAVE ANY
22 EXPERTISE WHEN IT COMES TO HOW TECH
23 COMPANIES USE MESSAGING PLATFORMS, DO
24 YOU?

25 A. I BELIEVE -- I BELIEVE THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 109

1 OPINIONS THAT I STATE COVER ALL
2 COMPANIES, INCLUDING TECH COMPANIES. I
3 DON'T BELIEVE TECH COMPANIES HAVE ANY
4 ADDITIONAL REQUIREMENTS OR ANY ADDITIONAL
5 SITUATION -- ANY ADDITIONAL REGULATORY
6 REQUIREMENTS THAT WOULD AFFECT THAT.

7 Q. THAT IS NOT QUITE MY QUESTION.
8 HAVE YOU EVER ADVISED A TECH
9 COMPANY ON THE RETENTION SETTINGS IT
10 SHOULD USE WHEN IT COMES TO INSTANT
11 MESSAGING?

12 A. I'VE ADVISED OTHER COMPANIES
13 BUT NOT TECH COMPANIES.

14 Q. HAVE YOU EVER REVIEWED A TECH
15 COMPANY'S RETENTION POLICY FOR INSTANT
16 MESSAGES IN ORDER TO PROVIDE IT GUIDANCE
17 OR ADVICE?

18 A. I'VE REVIEWED GOOGLE'S
19 POLICIES.

20 Q. GOOGLE DIDN'T HIRE YOU TO
21 PROVIDE IT GUIDANCE OR ADVICE, DID IT?

22 A. NO.

23 Q. OKAY. SO MY QUESTION WAS, HAS
24 ANY TECH COMPANY HIRED YOU OR YOUR TEAM
25 AT BRG TO SAY, HEY, THESE ARE MY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 110

1 RETENTION SETTINGS FOR MY INSTANT
2 MESSAGING TOOL, I'D LIKE YOUR ADVICE? HAS
3 THAT EVER HAPPENED?

4 MR. RENARD: OBJECTION TO THE
5 FORM OF THE QUESTION.

6 A. IT'S POSSIBLE COLLEAGUES AT
7 BRG WERE RETAINED. I WAS NOT INVOLVED
8 WITH SUCH REPRESENTATION.

9 Q. SO WHEN YOU TOOK THIS CASE AND
10 LOOKED AT GOOGLE'S CHAT RETENTION POLICY,
11 WAS THAT THE FIRST ONE FOR A TECH COMPANY
12 YOU'D EVER REVIEWED?

13 A. I'VE REVIEWED MANY RETENTION
14 POLICIES BUT, AGAIN, I'VE NOT REPRESENTED
15 NUMEROUS CLIENTS IN THE TECH INDUSTRY.

16 MS. NAJAM: OBJECT AS
17 NONRESPONSIVE.

18 Q. WE TALKED ABOUT YOUR
19 REPRESENTATION EARLIER AS A LAWYER. MY
20 QUESTION IS A LITTLE BIT DIFFERENT.

21 IN ALL OF YOUR 20-ISH YEARS
22 WHERE YOU'VE BEEN INVOLVED IN EDISCOVERY,
23 HAS ANY -- HAVE YOU EVER REVIEWED A TECH
24 COMPANY'S RETENTION POLICY FOR CHATS?

25 MR. RENARD: OBJECTION TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 111

1 FORM.

2 A. NOT AS THEIR ADVISOR.

3 Q. HOW ABOUT PERIOD? SO MY
4 ORIGINAL QUESTION IS YOU SAW THE CHAT
5 POLICY IN THIS CASE, THE CHAT RETENTION
6 POLICY IN THIS CASE FOR GOOGLE, RIGHT?
7 SIR, YOU'VE REVIEWED THAT?

8 MR. RENARD: I OBJECT TO THE
9 PREFATORY STATEMENT LEADING UP TO
10 THE QUESTION.

11 MS. NAJAM: I'LL ASK THE
12 QUESTION AGAIN.

13 Q. BEFORE THIS CASE HAD YOU EVER
14 LAID EYES ON A TECH COMPANY'S INSTANT
15 MESSAGING RETENTION POLICY?

16 A. NO, BUT THEY'RE USUALLY NOT
17 PUBLICLY AVAILABLE AND I DON'T BELIEVE
18 GOOGLE HAS BEEN MADE PUBLICLY AVAILABLE.

19 MS. NAJAM: I'LL OBJECT TO
20 ANYTHING AFTER "NO" AS
21 NONRESPONSIVE.

22 Q. LET ME TAKE YOU TO PARAGRAPH
23 40 IN YOUR REPORT, SIR.

24 MR. RENARD: COUNSEL, I DON'T
25 MEAN TO PREEMPT THIS, JUST WHENEVER

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Page 112

1 AS WE GO INTO THIS NEXT SUBJECT,
2 YOU COMPLETE THAT, I'D LIKE TO TAKE
3 A BREAK. IT'S BEEN OVER AN HOUR.

4 MS. NAJAM: YES, SIR.

5 Q. IN PARAGRAPH 40 YOU ARE
6 SUMMARIZING YOUR "REBUTTAL OPINIONS".
7 YOU END WITH SAYING, "AND THUS, GOOGLE
8 DID NOT VIOLATE ANY PRESERVATION
9 OBLIGATIONS", AND THEN YOU SAY THAT'S
10 INCORRECT. DO YOU SEE WHERE I AM?

11 A. YES.

12 Q. SIR, DID MR. MALKIEWICZ
13 ANYWHERE IN HIS REPORT ACTUALLY
14 SPECIFICALLY OPINE THAT GOOGLE DIDN'T
15 VIOLATE ITS PRESERVATION OBLIGATIONS?

16 A. THIS STATEMENT WAS IN THE
17 CONTEXT OF MR. MALKIEWICZ'S OPINIONS,
18 AGAIN, YOU KNOW, STARTING WITH PARAGRAPH
19 21 WHERE HE STATES THAT THESE INFORMATION
20 GOVERNANCE ARE WIDESPREAD, AND THROUGHOUT
21 HE PROVIDES HIS VIEWS ON HOW GOOGLE
22 FOLLOWED ITS RECORDS RETENTION AND
23 LITIGATION HOLD POLICIES.

24 MS. NAJAM: OKAY. OBJECT AS
25 NONRESPONSIVE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 113

1 Q. WE'VE LOOKED AT PARAGRAPH 21.
2 CAN YOU SPECIFY ANY OTHER PARAGRAPHS IN
3 MR. MALKIEWICZ'S REPORT WHERE HE, IN YOUR
4 VIEW, IS OFFERING THE OPINION THAT GOOGLE
5 DIDN'T VIOLATE ITS PRESERVATION
6 OBLIGATIONS?

7 A. THE BASIS OF HIS OPINIONS IS
8 THAT GOOGLE EMPLOYEES FOLLOWED THE
9 INSTRUCTIONS THEY WERE PROVIDED AND
10 TURNED HISTORY OFF AND ON WERE NOT
11 CONFUSED. AND, AGAIN, YOU KNOW, AS A
12 RESULT I THINK THE CONTEXT IS THAT GOOGLE
13 DID NOT VIOLATE ITS PRESERVATION
14 OBLIGATIONS. HE DOES NOT SPECIFICALLY
15 STATE THAT.

16 Q. IN FACT, HE DOESN'T USE THE
17 WORD "OBLIGATIONS" ANYWHERE IN HIS
18 REPORT, DOES HE, SIR, THAT YOU RECALL?

19 A. NOT THAT I RECALL.

20 Q. AND WE'VE BEEN LOOKING AT HIS
21 REPORT FOR A FEW MINUTES, TELL ME IF YOU
22 NEED MORE TIME. BUT HE DOESN'T -- HE
23 DEFINITELY DOESN'T REFERENCE ANY LEGAL
24 OBLIGATIONS THAT HE THINKS GOOGLE
25 COMPLIED WITH, RIGHT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 114

1 A. NOT THAT I CAN RECALL.

2 MS. NAJAM: OKAY. LET'S TAKE A
3 BREAK.

4 VIDEOGRAPHER: IT'S 11:44 A.M.
5 WE'RE GOING OFF THE RECORD.

6 (RECESS IS TAKEN.)

7 VIDEOGRAPHER: THE TIME IS
8 APPROXIMATELY 12:02 P.M. WE ARE
9 BACK ON THE RECORD.

10 Q. MR. GRANDE, BEFORE THE BREAK
11 WE TALKED ABOUT SOME OF THE LITIGATION
12 HOLD NOTICES THAT WENT OUT AFTER THE CID
13 DEMAND WAS ISSUED IN THE FALL OF 2019. DO
14 YOU RECALL THAT GENERALLY?

15 A. I DO.

16 Q. I'M ACTUALLY GOING TO HAND YOU
17 WHAT WAS MARKED AS EXHIBIT 6 TO YOUR
18 DEPOSITION.

19 (GRANDE EXHIBIT 6, COPIES OF
20 REDACTED LEGAL HOLD NOTICES, WAS
21 RECEIVED AND MARKED ON THIS DATE
22 FOR IDENTIFICATION.)

23 Q. AND THESE ARE -- PLEASE
24 CONFIRM FOR ME THAT THESE ARE REDACTED
25 VERSIONS OF LEGAL HOLD NOTICES THAT YOU

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 115

1 REVIEWED IN CONNECTION WITH YOUR REPORT
2 IN THIS CASE? AND IF WE CAN SHORTCUT THIS
3 IF YOU LOOK AT YOUR REPORT, PAGE 34,
4 FOOTNOTE 90.

5 A. PAGE 34?

6 Q. FOOTNOTE 90.

7 A. YES.

8 Q. YOU WERE CITING THE DOCUMENTS
9 THAT ARE CONTAINED IN EXHIBIT 6, CORRECT?

10 A. YES.

11 Q. LET'S GO TO PAGE BATES PAGE
12 ENDING IN 451. THE RECIPIENTS OF THIS
13 LEGAL HOLD WERE TOLD, "PLEASE DO NOT USE
14 THE FOLLOWING TOOLS OR MESSAGING APPS TO
15 DISCUSS ANY TOPICS COVERED BY THIS LEGAL
16 HOLD." DID I READ THAT CORRECTLY?

17 A. YES.

18 Q. AND IN THE SECOND BULLET THERE
19 GOOGLE CHAT IS LISTED AS AN EXAMPLE OF A
20 TOOL NOT TO USE, RIGHT?

21 A. YES, WITH THE PARENTHETICAL
22 FOLLOWING.

23 Q. SORRY. AND IN THE
24 PARENTHETICAL THAT YOU JUST MENTIONED IT
25 SAYS, "IF YOU MUST DO SO, PLEASE MAKE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 116

1 SURE THE SETTINGS PRESERVE THE MESSAGES ,
2 SUCH AS SWITCHING TO "HISTORY ON" FOR
3 CHAT OR HANGOUTS ." DID I READ THAT
4 PARENTHETICAL CORRECTLY?

5 A. YES .

6 Q. AND THIS WAS NOT THE ONLY
7 EXAMPLE OF LITIGATION HOLD LANGUAGE THAT
8 YOU REVIEWED ALONG THOSE LINES , IS IT?

9 MR. RENARD : OBJECTION TO
10 FORM .

11 A. NO , THERE IS A SIMILAR ONE . I
12 BELIEVE IT'S THE NEXT DOCUMENT HAS THE
13 SAME LANGUAGE .

14 Q. LET'S LOOK AT THE PAGE ENDING
15 IN 457 . DID YOU READ THIS BULLET HERE
16 THAT SAYS "GOOGLE CHAT" , IN CONNECTION
17 WITH YOUR WORK ON THIS CASE?

18 A. I DID .

19 Q. AND IT SAYS , "IT'S OKAY TO USE
20 GOOGLE CHAT FOR PURELY NON-SUBSTANTIVE
21 THINGS" , AND IT GIVES A COUPLE OF
22 EXAMPLES . DO YOU SEE THAT?

23 A. I DO .

24 Q. LIKE REMINDING -- ASKING
25 SOMEBODY WHEN THEY'RE GOING TO BE OUT OF

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 117

1 OFFICE IS LISTED AS AN EXAMPLE, RIGHT,
2 SIR?

3 A. YES.

4 Q. AND THEN IT SAYS, "HOWEVER,
5 FOR DISCUSSION OF ANY TOPIC COVERED BY
6 THE LEGAL HOLD IT'S BEST TO AVOID CHAT."
7 AND THEN THERE IS A RECOMMENDATION THAT
8 THE PERSON USE EMAIL. DO YOU SEE THAT? DO
9 YOU SEE THE RECOMMENDATION TO USE EMAIL
10 INSTEAD?

11 A. I DO.

12 Q. OKAY. AND THEN IT SAYS IN
13 BOLD, "IF YOU NEED TO USE GOOGLE CHAT TO
14 TALK ABOUT TOPICS COVERED BY THE
15 LITIGATION HOLD THEN YOU NEED TO GO ON
16 THE RECORD TO MAKE SURE THAT YOUR
17 COMMUNICATIONS WILL BE PRESERVED. THIS
18 MEANS ACTUALLY SWITCHING YOUR CHAT
19 SETTING TO 'HISTORY ON'." DID I READ THAT
20 CORRECTLY?

21 A. YES.

22 Q. AND SIR, BASED ON YOUR
23 KNOWLEDGE OF WHAT THE CHAT RETENTION
24 POLICY WAS MORE GENERALLY, OUTSIDE OF
25 LITIGATION HOLDS, CAN WE AGREE THAT THIS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 118

1 IS AN EXAMPLE OF GOOGLE ADJUSTING OR
2 DIRECTING AN ADJUSTMENT OF ITS USE OF
3 CHAT IN THE FACE OF A LITIGATION HOLD?

4 A. WHICH IS AN EXAMPLE? CAN YOU
5 CLARIFY?

6 Q. EITHER OF THEM. LET ME ASK A
7 BETTER QUESTION.

8 IN THE TWO EXAMPLES THAT WE
9 SAW DO YOU AGREE THAT GOOGLE IS DIRECTING
10 EMPLOYEES TO AVOID CHAT TO TALK ABOUT
11 STUFF RELEVANT TO THE LIT HOLD?

12 A. IN MY MIND THE QUESTION IS DO
13 THEY KNOW WHAT'S COVERED BY THE LIT HOLD?
14 THAT'S THE -- THAT'S PART OF THE
15 QUESTION.

16 Q. OKAY. WE'LL GET THERE. I'LL
17 OBJECT AS NONRESPONSIVE.

18 MY QUESTION IS, IN THE TWO
19 EXAMPLES THAT WE JUST READ, ISN'T IT TRUE
20 THAT GOOGLE IS DIRECTING EMPLOYEES AVOID
21 CHAT TO TALK ABOUT THINGS THAT ARE WITHIN
22 THE SCOPE OF THE HOLD?

23 A. I MEAN, THE LANGUAGE SAYS TO
24 AVOID CHAT BUT IF YOU MUST DO SO, BE SURE
25 TO HAVE THE PROPER SETTINGS IN PLACE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 119

1 Q. MORE SPECIFICALLY, IF YOU MUST
2 DO SO, MAKE SURE YOUR HISTORY IS ON SO
3 THE MESSAGE IS SAVED, RIGHT?

4 A. YES.

5 Q. AND YOU SAID -- YOU SAID THAT
6 YOU'RE NOT SURE WHETHER FOLKS WOULD
7 UNDERSTAND WHAT WAS IN THE HOLD. YOU
8 DON'T KNOW WHAT WAS UNDER THESE BLACK
9 BOXES OF INSTRUCTIONS, DO YOU?

10 A. THEY WERE NOT PRODUCED, AS FAR
11 AS I'M AWARE.

12 Q. THEY WEREN'T PRODUCED -- I
13 MEAN IN YOUR EXPERIENCE, THIS IS A
14 CONFIDENTIAL ATTORNEY-CLIENT
15 COMMUNICATION, RIGHT?

16 A. MY EXPERIENCE OF LITIGATION
17 HOLDS HAVE BEEN PRODUCED IN OTHER CASES
18 UNREDACTED.

19 MS. NAJAM: THAT WAS NOT MY
20 QUESTION, SO I'LL OBJECT AS
21 NONRESPONSIVE.

22 Q. IN YOUR EXPERIENCE, GENERALLY
23 SPEAKING, THE SPECIFIC LANGUAGE THAT IS
24 USED IN A LITIGATION HOLD TO GIVE DETAILS
25 ON WHAT KINDS OF THINGS TO KEEP, WHAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 120

1 Kinds of things you don't need to keep,
2 those are privileged, right?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. NOT IN A SITUATION LIKE THIS
6 WHERE THAT'S A QUESTION.

7 MS. NAJAM: I'LL OBJECT AS
8 NONRESPONSIVE.

9 Q. YOU SAID "A SITUATION LIKE
10 THIS". THAT'S BECAUSE YOU'RE AWARE THAT
11 THE STATES HAVE MOVED FOR SANCTIONS AS OF
12 LAST WEEK; IS THAT RIGHT?

13 A. NO. I'M JUST REFERENCING THE
14 FACT THAT THERE'S DISCOVERY ON DISCOVERY
15 THAT'S BEEN ALLOWED IN THIS CASE.

16 Q. OH, GOT IT. SO YOUR OPINION IS
17 THAT GIVEN THE DISCOVERY ON DISCOVERY,
18 INCLUDING TODAY'S DEPOSITION, WHICH IS
19 DISCOVERY ON DISCOVERY ON DISCOVERY, BY
20 THIS POINT THE BLACK BOX SHOULD HAVE BEEN
21 LIFTED; IS THAT RIGHT?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. IF THE ARGUMENT IS THAT THE
25 LITIGATION HOLD WAS SUFFICIENT, I BELIEVE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 121

1 ADDITIONAL INFORMATION SHOULD HAVE BEEN
2 PROVIDED ABOUT THE SCOPE OF WHAT WAS
3 BEING ASKED TO BE PRESERVED.

4 Q. HOW MANY TIMES HAVE YOU
5 REVIEWED THE FULL LANGUAGE OF ALL OF THE
6 LITIGATION HOLDS OF AN OPPOSING PARTY?

7 MR. RENARD: OBJECTION TO
8 FORM.

9 A. I CAN'T RECALL.

10 Q. CAN YOU RECALL EVEN ONE
11 INSTANCE?

12 A. YES.

13 Q. WHAT WAS IT?

14 A. IN A CASE I'VE BEEN INVOLVED
15 WITH THEY DID NOT PROVIDE HOLDS.

16 Q. IN ONE CASE?

17 A. IN ONE CASE THAT I CAN RECALL.

18 Q. I'M ASKING HOW MANY CASES YOU
19 CAN RECALL AND WE'LL GO THROUGH THEM. IS
20 IT MORE THAN ONE OR JUST ONE?

21 A. JUST ONE I CAN THINK OF.
22 THERE MAYBE MORE THAN ONE. I CAN'T
23 REMEMBER.

24 Q. WHAT IS THE ONE YOU CAN THINK
25 OF? WHAT DID THE CASE INVOLVE?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 122

1 A. I CAN'T NAME THE PARTIES BUT I
2 MEAN IT WAS A LITIGATION MATTER WHERE A
3 PART OF THE PRODUCTION OF THE OTHER SIDE
4 INCLUDED THEIR LITIGATION HOLD.

5 Q. HOW MANY COMPANIES HAVE YOU
6 ADVISED TO COMPLETELY PHYSICALLY SHUT
7 DOWN AN EMPLOYEES' ABILITY TO USE A CHAT
8 SYSTEM BECAUSE THEY WERE ON HOLD?

9 MR. RENARD: OBJECTION TO
10 FORM.

11 A. CAN YOU REPEAT THAT QUESTION?

12 Q. HOW MANY COMPANIES, IF ANY,
13 HAVE YOU ADVISED TO SHUT DOWN, LIKE
14 PHYSICALLY SHUT DOWN EMPLOYEES' ABILITY
15 TO USE AN INSTANT MESSAGING SYSTEM
16 BECAUSE THEY WERE ON HOLD, LITIGATION
17 HOLD?

18 A. I CAN'T RECALL HOW MANY.

19 Q. CAN YOU RECALL EVEN ONE?

20 A. I CAN RECALL SEVERAL CASES
21 WHERE EMPLOYEES WERE DIRECTED NOT TO USE
22 INSTANT MESSAGING SYSTEMS UNDER A
23 LITIGATION HOLD.

24 Q. OKAY. DIRECTED TO, AS IN
25 INSTRUCTED TO, NOT USE IM DURING THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 123

1 HOLD?

2 A. THAT'S CORRECT.

3 Q. BUT I'M NOT TALKING ABOUT
4 VERBAL INSTRUCTIONS.

5 HOW MANY TIMES HAVE YOU
6 ADVISED A COMPANY TO PHYSICALLY MAKE IT
7 IMPOSSIBLE FOR EMPLOYEES UNDER HOLD TO
8 USE AN INSTANT MESSAGING SYSTEM, HAS THAT
9 EVER HAPPENED?

10 A. I DON'T BELIEVE THAT I'VE EVER
11 HAD TO DIRECT THAT.

12 Q. YOU'VE NEVER DIRECTED IT?

13 A. I DON'T BELIEVE SO.

14 Q. HOW MANY TIMES, IF ANY, HAVE
15 YOU ADVISED A COMPANY TO MAKE IT
16 PHYSICALLY IMPOSSIBLE FOR EMPLOYEES UNDER
17 A HOLD TO SEND AN ELECTRONIC
18 COMMUNICATION THAT CANNOT BE SAVED?

19 A. I DON'T BELIEVE I'VE EVER HAD
20 TO DO THAT.

21 Q. IN PARAGRAPH 61 OF YOUR
22 REPORT, IN YOUR LAST SENTENCE YOU SAY,
23 "IT IS COMMON PRACTICE FOR COMPANIES TO
24 SET THEIR COMPANY-APPROVED INSTANT
25 MESSAGING PLATFORM TO RETAIN ALL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 124

1 CHATS/MESSAGES FOR EMPLOYEES WHO ARE
2 SUBJECT TO A LITIGATION HOLD." DID I READ
3 THAT CORRECTLY?

4 A. YES.

5 Q. AND THERE IS NOTHING CITED
6 HERE. WHAT IS YOUR SOURCE FOR THIS COMMON
7 PRACTICE? WHAT INDUSTRY SOURCE CAN I LOOK
8 TO FOR THAT?

9 MR. RENARD: OBJECTION TO
10 FORM.

11 A. I MEAN THAT STATEMENT, AGAIN,
12 IS BASED UPON MY EXPERIENCE IN INDUSTRY
13 STANDARDS AND PRACTICES WHICH DO INCLUDE,
14 YOU KNOW, THE PEER-REVIEWED SEDONA
15 CONFERENCE, PUBLICATIONS, INCLUDING THE
16 ONE THAT IS CITED TO IN THE FOLLOWING
17 PARAGRAPH.

18 Q. WELL, IN THE FOLLOWING
19 PARAGRAPH, ARE YOU TALKING ABOUT
20 PARAGRAPH 62?

21 A. YES.

22 Q. AND YOU'RE CITING TO THE
23 SEDONA CONFERENCE, THAT'S THE VOLUME ON
24 EPHEMERAL MESSAGING PUT OUT IN 2021; IS
25 THAT CORRECT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 125

1 A. THAT'S CORRECT.

2 Q. AND IN THE PARENTHETICAL THAT
3 YOU ACTUALLY QUOTE HERE, I'M GOING TO NOT
4 READ IT WORD FOR WORD, BUT WHAT SEDONA
5 ADVISED IS THAT THE ORGANIZATION SHOULD
6 CONSIDER REASONABLE ALTERNATIVES,
7 INCLUDING A POSSIBLE PROHIBITION ON THE
8 USE OF EPHEMERAL MESSAGING. DO YOU SEE
9 THAT?

10 A. YES.

11 Q. SO EVEN SEDONA SAYS THAT IF AN
12 APPLICATION DOESN'T HAVE A LEGAL HOLD
13 CAPABILITY THAT CAN RETAIN, IN OUR
14 EXAMPLE, "OFF THE RECORD" CHAT MESSAGES,
15 THE ORGANIZATION SHOULD CONSIDER SOME
16 ALTERNATIVES, RIGHT?

17 A. THAT'S WHAT IT SAYS, YES.

18 Q. AND ONE ALTERNATIVE IS A
19 POSSIBLE PROHIBITION ON THE USE OF
20 MESSAGES THAT CAN'T BE SAVED, RIGHT?

21 A. THAT'S CORRECT.

22 Q. OKAY. BUT I WANT TO GO BACK TO
23 PARAGRAPH 61.

24 MY QUESTION WAS COMMON
25 PRACTICE FOR COMPANIES, NOT WHAT SEDONA

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 126

1 SAYS FOLKS SHOULD DO. CAN YOU CITE ME
2 ANYTHING FOR YOUR OPINION THAT COMPANIES
3 COMMONLY SET THEIR IM TOOLS TO RETAIN ALL
4 CHATS FOR ALL EMPLOYEES ON A HOLD?

5 MR. RENARD: OBJECTION TO THE
6 FORM OF THE QUESTION.

7 A. GOOGLE'S OWN CHAT PROGRAM FOR
8 -- OUTSIDE FOR THIRD PARTIES, ITSELF,
9 ALLOWED FOR LITIGATION HOLDS TO BE PUT IN
10 PLACE WHERE "HISTORY OFF" WOULD BE
11 PERMANENTLY TURNED OFF FOR LITIGATION
12 HOLD RECIPIENTS, BUT THAT WAS NOT AN
13 OPTION INTERNALLY.

14 Q. YOU'RE TALKING ABOUT THE
15 FEATURES OF WHAT YOU BELIEVE TO BE AN
16 EXTERNAL VERSION OF CHATS WHERE FOLKS CAN
17 DO THIS? THAT IS THEY CAN -- SORRY --
18 CUSTOMERS CAN FORCE "HISTORY ON" AND MAKE
19 IT STICK FOR EMPLOYEES, RIGHT?

20 MR. RENARD: OBJECTION TO THE
21 FORM.

22 A. YES.

23 Q. I DON'T WANT TO -- WE WILL
24 TALK ABOUT THAT, ABOUT WHAT THE TOOL
25 COULD AND COULDN'T HAVE DONE. I WANT TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 127

1 KNOW WHAT YOU CAN CITE AS FOR THE
2 PROPOSITION THAT IT'S COMMON FOR
3 COMPANIES TO TAKE ALL THE FOLKS WHO WERE
4 ON HOLD AND SET THEIR IM PLATFORMS TO
5 RETAIN EVERY SINGLE TIME THEY SEND A
6 MESSAGE NO MATTER WHAT THE SUBJECT? HOW
7 DO YOU KNOW THAT'S A COMMON PRACTICE?

8 MR. RENARD: OBJECT TO THE
9 SENTENCE PRECEDING THE QUESTION.

10 A. I KNOW IT'S A COMMON PRACTICE
11 BECAUSE THAT IS THE STANDARD IN THE
12 INDUSTRY FROM, YOU KNOW, THAT THE
13 ORGANIZATIONS AND -- THAT I'VE BEEN
14 INVOLVED WITH, THE PEOPLE THAT I WORK
15 WITH, BUT IN ADDITION, OTHER -- YOU KNOW,
16 AND HERE WE'RE DEALING WITH GOOGLE AND
17 THE PRODUCTS THAT THEY HAVE CREATED,
18 OTHER PRODUCTS THAT ARE OUT -- AND I DID
19 MENTION GOOGLE'S PUBLIC PRODUCTS FOR
20 NON-EMPLOYEES. BUT IN ADDITION, YOU KNOW,
21 THERE ARE OTHER PRODUCTS, INCLUDING
22 MICROSOFT THAT HAVE LITIGATION HOLD
23 SETTINGS THAT WOULD RETAIN ALL TEAMS
24 MESSAGES.

25 Q. OKAY. LET'S TAKE THOSE ONE BY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 128

1 ONE .

2 YOU SAID YOU KNOW IT'S A
3 COMMON PRACTICE BECAUSE THAT'S A STANDARD
4 IN THE INDUSTRY. BESIDES MICROSOFT, CAN
5 YOU NAME ANY OTHER COMPANY THAT YOU THINK
6 HAS A PRACTICE OF SETTING THEIR IM TOOLS
7 TO PRESERVE EVERY SINGLE CHAT MESSAGE
8 SENT BY SOMEONE ON HOLD NO MATTER WHAT
9 THE SUBJECT?

10 MR. RENARD: OBJECT TO THE
11 SENTENCE PRECEDING THE QUESTION.

12 A. THAT'S THE PRACTICE FOR
13 SEVERAL OF MY CLIENTS. I'M NOT AT LIBERTY
14 TO DISCLOSE THEIR NAMES BUT THAT'S THE
15 PRACTICE I SEE IN MY DAILY WORK.

16 Q. SO YOU CAN'T TELL US ANY OF
17 THE NAMES OF THE COMPANIES THAT YOU ARE
18 SAYING DOES THIS, EXCEPT FOR MICROSOFT,
19 RIGHT?

20 A. I'M NOT SAYING MICROSOFT DOES
21 IT. I'M SAYING THEIR PRODUCT ALLOWS FOR
22 THAT WHEN LITIGATION HOLDS ARE PUT IN
23 PLACE.

24 Q. SO TO RECAP EVERYTHING YOU
25 SAID IN TERMS OF WHAT COMPANIES DO, WHAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 129

1 THEIR COMMON PRACTICE IS, YOU CAN'T
2 ACTUALLY NAME US ONE COMPANY THAT DOES
3 THIS?

4 MR. RENARD: OBJECT TO THE
5 FORM.

6 A. COMPANIES DO NOT LIST THEIR
7 PRACTICES OUT IN THE PUBLIC.

8 Q. CAN YOU NAME ONE COMPANY WHO
9 IS PART OF THIS SO-CALLED COMMON PRACTICE
10 OF SETTING THEIR IM TOOL TO KEEP ALL
11 CHATS FROM EMPLOYEES UNDER HOLD NO MATTER
12 WHAT THE SUBJECT?

13 A. I HAVE AGREEMENTS WITH MY
14 CLIENTS AND I'M -- I CAN'T DISCLOSE THE
15 NAMES OF CLIENTS THAT DO HAVE THAT
16 PRACTICE BUT I CAN TELL YOU THAT THAT IS
17 THE PRACTICE OF THE CLIENTS THAT I HAVE
18 WORKED WITH.

19 Q. JUST TO WRAP THIS UP, BESIDES
20 TAKING YOUR WORD FOR IT THAT YOU HAVE
21 CLIENTS THAT DO THIS, CAN YOU CITE TO US
22 ANY OTHER AUTHORITY FOR THIS OPINION THAT
23 IT'S A COMMON PRACTICE?

24 MR. RENARD: OBJECTION TO
25 FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 130

1 A. I REFER BACK TO MY ORIGINAL
2 ANSWER -- OR ANSWER AN EARLIER QUESTION,
3 YOU KNOW, THE COMMENTARY ON EPHEMERAL
4 MESSAGING ADDRESSES THIS POINT, THE
5 SEDONA CONFERENCE.

6 Q. THANK YOU. YOUR NEXT PARAGRAPH
7 62 HAS SOME STRONG ADVICE FROM YOU TO
8 PREVENT ACCESS OR PROHIBIT THE USE OF
9 SUCH SYSTEMS FOR LITIGATION HOLD
10 RECIPIENTS FOR THE DURATION OF THE
11 LITIGATION HOLD. DO YOU SEE WHERE I AM?

12 A. YES.

13 Q. AND THEN YOU SAY, "IT IS MY
14 OPINION THAT A COMPANY THAT DOES NOT IS
15 IN VIOLATION OF ITS OBLIGATION TO
16 PRESERVE." DID I READ THAT RIGHT?

17 A. YES, THAT'S WHAT I STATE.

18 Q. SO EARLIER YOU MENTIONED
19 YOU'RE NOT TRYING TO OFFER LEGAL OPINIONS
20 HERE. THAT'S A LEGAL OPINION, ISN'T IT,
21 SIR?

22 MR. RENARD: OBJECT TO FORM.

23 A. I DO NOT BELIEVE THAT'S A
24 LEGAL OPINION.

25 Q. OKAY. SO WHEN YOU TALK ABOUT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 131

1 AN OBLIGATION TO PRESERVE, IF NOT A LEGAL
2 OBLIGATION, WHAT KIND OF OBLIGATION IS
3 IT?

4 A. THE DUTY TO PRESERVE IS AN
5 OBLIGATION THAT'S THE BEDROCK OF
6 EDISCOVERY PRACTICES AND WHILE IT IS
7 BASED ON THE LAW, I'M NOT MAKING A LEGAL
8 OPINION IN THIS SITUATION, THAT I'M JUST
9 STATING WHETHER I -- YOU KNOW, MY VIEWS
10 ON WHETHER DATA WAS PRESERVED IN A TIMELY
11 MANNER.

12 Q. SO THAT LAST SENTENCE, THAT
13 YOU BELIEVE A COMPANY WHO DOESN'T
14 PROHIBIT THE USE OF INSTANT MESSAGING
15 SYSTEMS FOR HOLD RECIPIENTS, ARE YOU
16 RETRACTING THAT SENTENCE NOW?

17 A. NO.

18 Q. OKAY. SO YOU STILL THINK A
19 COMPANY WHO DOESN'T DO THAT VIOLATES AN
20 OBLIGATION BUT YOUR TESTIMONY IS THAT
21 IT'S NOT A LEGAL OBLIGATION?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. NO, IT IS. AGAIN, THE
25 OBLIGATION TO PRESERVE IS BASED ON LEGAL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 132

1 ISSUES. I'M NOT PROVIDING A LEGAL
2 OPINION. I BELIEVE THAT WAS THE QUESTION
3 YOU ASKED.

4 Q. BUT IT'S YOUR OPINION THAT A
5 COMPANY WHO DOESN'T DO CERTAIN THINGS
6 VIOLATES ITS LEGAL DUTIES, RIGHT?

7 A. I DON'T STATE THAT THEY
8 VIOLATED A LAW. I SAY IT'S A VIOLATION OF
9 AN OBLIGATION TO PRESERVE.

10 Q. BESIDES BEING ROOTED IN THE
11 LAW, CAN YOU TELL ME WHERE ELSE AN
12 OBLIGATION TO PRESERVE WOULD COME FROM?

13 MR. RENARD: OBJECTION TO
14 FORM.

15 A. IT WOULD COME FROM INDUSTRY
16 STANDARDS AND PRACTICE, PEER-REVIEWED
17 PUBLICATIONS LIKE SEDONA. YOU KNOW,
18 AGAIN, IT'S A GENERAL OBLIGATION OR DUTY
19 WITHIN THE -- ACROSS INDUSTRIES.

20 Q. LET'S TALK ABOUT SEDONA, SINCE
21 IT KEEPS COMING UP. AM I RIGHT THAT IT IS
22 A POLICY AND LAW THINK TANK?

23 MR. RENARD: OBJECTION TO THE
24 PREFATORY SENTENCE.

25 A. THE SEDONA CONFERENCE IT'S A

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 133

1 PEER REVIEWED -- IT PRODUCES
2 PEER-REVIEWED PUBLICATIONS THAT ARE
3 COMPILED BY A COMBINATION OF ATTORNEYS
4 AND JUDGES AND IN MORE INSTANCE THAN ONCE
5 HAS BEEN CITED TO IN JUDICIAL OPINIONS AS
6 AN AUTHORITY ON EDISCOVERY PRACTICES.

7 MS. NAJAM: I'LL OBJECT AS
8 NONRESPONSIVE. WE'LL GET THERE.

9 Q. YOU HAVE PERSONALLY DESCRIBED
10 IT AS A LAW AND POLICY THINK TANK, RIGHT,
11 SIR? I'M NOT LOOKING AT YOUR REPORT. I'M
12 JUST ASKING IN GENERAL.

13 A. I DON'T THINK I'VE USED THE
14 WORD "THINK TANK". IF IT'S IN MY REPORT
15 -- YOU CAN POINT TO THE PARAGRAPH BUT I
16 DON'T RECALL CALLING IT A THINK TANK.

17 Q. IN ANY EVENT, WHAT IT IS IS A
18 GROUP THAT PUTS OUT OBSERVATIONS AND
19 GUIDANCE, RIGHT?

20 A. I WOULDN'T SAY OBSERVATIONS.
21 IT PUTS OUT GUIDANCE ON EDISCOVERY, A
22 VARIETY OF EDISCOVERY ISSUES, TECHNOLOGY
23 ISSUES, THERE ARE DIFFERENT GROUPS, OF
24 COURSE, BUT I'M REFERENCING THE, FOR THE
25 MOST PART, WORKING FOR A GROUP.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 134

1 MS. NAJAM: I'LL OBJECT AS
2 NONRESPONSIVE.

3 Q. LET'S GO ONE BY ONE.

4 A. SURE.

5 Q. AS PART OF THE SEDONA
6 CONFERENCE'S PUBLICATIONS THEY OFTEN
7 INCLUDE OBSERVATIONS ABOUT THE INDUSTRY
8 OF EDISCOVERY, RIGHT?

9 A. THAT'S FAIR.

10 Q. AND THEY ALSO IN THEIR
11 PUBLICATIONS PUT OUT GUIDANCE IN TERMS OF
12 WHAT THEY THINK ARE BEST PRACTICES FOR
13 EDISCOVERY, RIGHT?

14 A. YES.

15 Q. AND THE GOAL OF THE SEDONA
16 CONFERENCE PUBLICATIONS IS TO HELP GUIDE
17 PRACTITIONERS, COURTS, AND COMPANIES FOR
18 WHEN IT COMES PARTICULARLY TO ESI, RIGHT?

19 A. YES.

20 Q. WHAT THE SEDONA CONFERENCE
21 SAYS IN ITS PUBLICATIONS, THEY'RE NOT THE
22 LAW; AM I RIGHT?

23 A. YES.

24 Q. IN FACT, THE HOPE OF THE
25 SEDONA CONFERENCE IS THAT JUDGES WILL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 135

1 ADOPT THEIR STANDARDS AND PRACTICES IN
2 THEIR OPINIONS, RIGHT?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. I CAN'T SAY THAT'S THE ONLY
6 PURPOSE OF SEDONA.

7 Q. WELL, IF THE SEDONA CONFERENCE
8 SAYS COMPANIES SHOULD DO X, THAT DOESN'T
9 BECOME LAW UNTIL A JUDGE ADOPTS IT,
10 RIGHT?

11 A. WELL, IT'S GENERAL GUIDANCE
12 FOR THE INDUSTRY, FOR COMPANIES, THAT
13 THIS IS WHAT THE PRACTICE IS THAT -- THAT
14 THE LEADING PRACTITIONERS AND EDISCOVERY
15 JUDGES, PLAINTIFFS' LAWYERS, DEFENSE
16 LAWYERS THINK ARE ACCEPTABLE, THINK ARE
17 REASONABLE BEST PRACTICES.

18 Q. EVEN IN SEDONA CONFERENCE'S
19 BEST PRACTICES, CAN YOU TESTIFY UNDER
20 OATH THAT SEDONA ADVISES COMPANIES TO
21 PREVENT ACCESS OR PROHIBIT THE USE OF
22 INSTANT MESSAGING FOR ALL LITIGATION HOLD
23 RECIPIENTS?

24 LET ME ASK A BETTER QUESTION.
25 I'M GOING TO STRIKE THAT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 136

1 DOES THE SEDONA CONFERENCE
2 OPINE THAT A COMPANY WHO DOESN'T PREVENT
3 ACCESS TO IM FOR LITIGATION HOLD
4 EMPLOYEES VIOLATES ITS OBLIGATION TO
5 PRESERVE?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. THE SEDONA CONFERENCE STATES
9 IN THE COMMENTARY ON EPHEMERAL MESSAGING
10 THE PROVISION THAT I QUOTE. I MEAN, IF
11 YOU LIKE I CAN, YOU KNOW, LOOK AT THE
12 COMMENTARY BUT, AGAIN, YOU'VE QUOTED THIS
13 ALREADY, "IF AN APPLICATION DOES NOT HAVE
14 LEGAL HOLD CAPABILITY THEY COULD RETAIN
15 COMMUNICATIONS. IN THE EVENT OF A DATA
16 RETENTION DIRECTIVE, THE ORGANIZATION
17 SHOULD CONSIDER REASONABLE ALTERNATIVES
18 FOR ADJUSTING RETENTION WHICH COULD
19 INCLUDE POSSIBLE PROHIBITION ON THE USE
20 OF EPHEMERAL MESSAGING."

21 Q. SURE. THAT'S "SHOULD
22 CONSIDER", "POSSIBLE PROHIBITION."

23 MY QUESTION IS DID THE SEDONA
24 CONFERENCE EVER COME OUT AND SAY IF YOU
25 DON'T SHUT IT DOWN FOR LITIGATION

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 137

1 EMPLOYEES THAT COMPANY SHOULD BE
2 CONSIDERING VIOLATING ITS DUTY TO
3 PRESERVE?

4 A. THIS IS THE GUIDANCE OF THE
5 SEDONA CONFERENCE. THEY DON'T -- THEY'RE
6 NOT GOING TO -- AGAIN, TO YOUR POINT IT'S
7 NOT THE LAW. THEY'RE PROVIDING BEST
8 PRACTICES AND GUIDANCE, AND THIS IS YOUR
9 GUIDANCE.

10 Q. SO THE SEDONA CONFERENCE IS
11 NOT GOING TO SAY IF YOU DON'T DO THIS
12 YOU'RE VIOLATING YOUR DUTY TO PRESERVE,
13 CORRECT? THAT'S NOT THE TYPE OF THING
14 THAT THEY SAY?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. THE SEDONA CONFERENCE AND
18 OTHER -- OTHER GUIDANCE, INCLUDING THE
19 GUIDANCE I CITE FROM THE FTC NOTES THAT
20 THE EPHEMERAL MESSAGING, INSTANT
21 MESSAGING NEEDS TO BE PRESERVED AS PER A
22 LEGAL HOLD, WHETHER THAT IS A LEGAL HOLD
23 CAPABILITY THAT PRESERVES ALL CHATS OR
24 MESSAGES OR IF NOT, ANOTHER METHOD WHICH
25 IN THIS CASE THE OTHER OPTION WOULD HAVE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 138

1 BEEN PUTTING A HOLD ON ALL -- OR
2 PREVENTING THE USE OF CHATS BY EMPLOYEES
3 WHO WERE SUBJECT TO THE LITIGATION HOLD.

4 Q. SO I'M NOT ASKING QUESTIONS
5 NOW ABOUT PRESERVING ALL RELEVANT CHAT
6 MESSAGES. I'M ASKING A BROADER QUESTION.
7 I'LL JUST TRY AGAIN.

8 CAN YOU CITE TO ANYTHING
9 ISSUED BY SEDONA THAT REQUIRES, THAT SAYS
10 COMPANIES ARE REQUIRED TO PHYSICALLY
11 PROHIBIT ANY EMPLOYEE ON HOLD FROM
12 SENDING ANY MESSAGE THAT'S NOT SAVED?

13 A. NO.

14 Q. CAN YOU CITE ANY INDUSTRY
15 STANDARD -- AND I'LL GET TO THE LAW IN A
16 SECOND -- BUT INDUSTRY STANDARD THAT
17 REQUIRES A COMPANY TO PHYSICALLY PROHIBIT
18 EMPLOYEES ON HOLD FROM SENDING CHAT
19 MESSAGES THAT IS NOT CAPABLE OF BEING
20 SAVED?

21 A. THE INDUSTRY STANDARD IS THAT
22 COMPANIES NEED TO PRESERVE POTENTIALLY
23 RESPONSIVE COMMUNICATIONS AND IF -- IF
24 THAT'S NOT FEASIBLE WITH THE CHAT
25 PLATFORM THERE NEEDS TO BE ANOTHER WAY TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 139

1 DO IT.

2 Q. AND ONE POSSIBLE OTHER WAY
3 URGED BY SEDONA IS BY INSTRUCTING
4 EMPLOYEES TO NOT USE A MESSAGING SYSTEM
5 THAT'S NOT KEEPING THE PARTICULAR CHAT,
6 RIGHT?

7 A. I DON'T RECALL IF IT STATES
8 THAT LANGUAGE.

9 Q. JUST TO BE CLEAR, GOOGLE IN
10 THIS CASE, AS WE SAW, INSTRUCTED ITS
11 EMPLOYEES TO; A, NOT USE CHAT TO TALK
12 ABOUT RELEVANT TOPICS TO THE HOLD; AND
13 THEN B, IF THEY HAD TO, TO TURN HISTORY
14 ON, CORRECT?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. THEY DID THAT BUT IT WAS NOT
18 CLEAR HOW THEY COULD COMPLY WITH IT OR
19 MADE IT VERY DIFFICULT FOR THEM TO COMPLY
20 WITH THOSE INSTRUCTIONS.

21 Q. YOU SAID "MADE IT VERY
22 DIFFICULT" AND "NOT CLEAR". LET'S TAKE
23 THEM ONE BY ONE.

24 IN TERMS OF IT BEING CLEAR OR
25 NOT, YOU DON'T KNOW BECAUSE OF THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 140

1 REDACTIONS ON THE PRODUCED VERSIONS ,
2 RIGHT?

3 A. NO. I BELIEVE THERE WERE OTHER
4 ISSUES WITH TURNING ON OF HISTORY --
5 TURNING HISTORY ON OR OFF THAT MADE IT
6 DIFFICULT FOR GOOGLE EMPLOYEES.

7 Q. ON THIS TOPIC OF IT BEING
8 CONFUSING, ARE YOU APPLYING YOUR
9 EDISCOVERY EXPERTISE TO FORM THE OPINION
10 THAT TURNING "HISTORY ON" MAY HAVE BEEN
11 CONFUSING?

12 A. I'M USING MY EDISCOVERY
13 EXPERTISE TO DETERMINE THAT IT WAS
14 DIFFICULT FOR EMPLOYEES TO COMPLY WITH
15 THE DIRECTION THAT THEY WERE GIVEN.

16 Q. I'M ASKING SPECIFICALLY ABOUT
17 AN OPINION THAT I'LL TOUCH MORE ON LATER.
18 IN YOUR SPECIFIC OPINION THAT
19 EMPLOYEES WERE CONFUSED ABOUT HOW TO TURN
20 "HISTORY ON", ARE YOU USING ANY EXPERTISE
21 TO COME TO THAT OPINION?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. ANYONE IN MY SITUATION WOULD
25 HAVE FOUND THAT THE EXAMPLES THAT I CITE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 141

1 TO THAT WERE PROVIDED BY GOOGLE EMPLOYEES
2 WERE CLEAR AND CONVINCING THAT THERE WAS
3 CONFUSION IN TURNING HISTORY ON OR OFF.

4 MS. NAJAM: OBJECT AS
5 NONRESPONSIVE.

6 Q. MY QUESTION IS WHETHER YOU
7 USED EXPERTISE. IS IT YOUR ANSWER THAT
8 YOU DIDN'T NEED ANY, IT WAS OBVIOUS TO
9 ANYBODY?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. I MEAN -- I MEAN, I USED
13 EXPERTISE IN REVIEWING ALL THE AVAILABLE
14 INFORMATION AND, AND COMING -- YOU KNOW,
15 PROVIDING THE OPINION THAT IT WAS
16 CONFUSING AND DIFFICULT FOR GOOGLE
17 EMPLOYEES TO COMPLY WITH THE LITIGATION
18 HOLD DIRECTIONS.

19 Q. OKAY. SORRY. I'M GOING TO HAVE
20 TO REASK A QUESTION THAT I DON'T THINK
21 I'VE GOTTEN AN ANSWER TO YET.

22 WE TALKED ABOUT SEDONA ON
23 EPHEMERAL MESSAGING. CAN YOU CITE TO ANY
24 INDUSTRY PUBLICATION AT ALL STATING THAT
25 COMPANIES MUST PHYSICALLY MAKE IT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 142

1 IMPOSSIBLE FOR AN EMPLOYEE TO SEND A
2 MESSAGE IF THEY'RE ON HOLD NO MATTER WHAT
3 THE TOPIC, THAT CAN'T BE SAVED?

4 MR. RENARD: I OBJECT TO THE
5 TWO SENTENCES PRECEDING THE
6 QUESTION AND TO THE QUESTION,
7 ITSELF, ON THE BASIS OF FORM.

8 MS. NAJAM: A LOT OF WORDS.

9 MR. RENARD: YUP.

10 A. CAN YOU REPHRASE THAT
11 QUESTION?

12 Q. YEAH. CAN YOU CITE TO ANY
13 INDUSTRY PUBLICATION AT ALL STATING THAT
14 COMPANIES MUST MAKE IT PHYSICALLY
15 IMPOSSIBLE FOR AN EMPLOYEE TO SEND A
16 MESSAGE IF THEY'RE ON HOLD, NO MATTER
17 WHAT THE TOPIC, THAT CANNOT BE SAVED?

18 A. THAT'S STILL A LITTLE UNCLEAR
19 ON WHAT YOU'RE ASKING.

20 Q. LET'S USE LESS WORDS. YOU
21 KNOW WHAT "OFF THE RECORD" CHAT IS,
22 RIGHT?

23 A. YES.

24 Q. IN THE CONTEXT OF THIS CASE AN
25 "OFF THE RECORD" CHAT IS ONE THAT WAS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 143

1 SENT WHEN THE HISTORY WAS OFF, RIGHT?

2 A. YES.

3 Q. AND IT'S NOT CAPABLE OF BEING
4 SAVED BECAUSE IT NEVER GOES INTO VAULT,
5 CORRECT?

6 A. YES.

7 Q. ARE YOU AWARE OF ANY INDUSTRY
8 STANDARD THAT SAYS A COMPANY HAS TO MAKE
9 IT PHYSICALLY IMPOSSIBLE FOR AN EMPLOYEE
10 ON LITIGATION HOLD TO SEND AN "OFF THE
11 RECORD" CHAT?

12 A. I'M NOT AWARE AND THAT'S NOT
13 SOMETHING I STATE IN MY OPINION.

14 Q. AND THAT'S NOT YOUR OPINION
15 THAT --

16 A. NOT THE WAY YOU STATED IT.

17 Q. I WANT TO BE REAL CLEAR ABOUT
18 THIS. IT IS NOT YOUR OPINION THAT A
19 COMPANY MUST MAKE IT PHYSICALLY
20 IMPOSSIBLE FOR AN EMPLOYEE ON LITIGATION
21 HOLD TO SEND AN "OFF THE RECORD" CHAT,
22 CORRECT?

23 A. CORRECT, THAT'S NOT MY
24 OPINION. THAT'S NOT IN MY REPORT.

25 Q. ARE YOU AWARE OF ANY PER SE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 144

1 RULE SAYING; WELL, COMPANIES CAN'T RELY
2 ON THE GOOD FAITH ACTIONS OF THEIR
3 EMPLOYEES TO RETAIN COMMUNICATIONS THAT
4 ARE WITHIN THE SCOPE OF A LITIGATION
5 HOLD?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. CAN YOU REPHRASE THAT?

9 Q. SURE. LET ME ASK IT BETTER.
10 ISN'T IT TRUE UNDER THE
11 INDUSTRY STANDARDS THAT YOU WORK WITH,
12 UNDER CERTAIN CIRCUMSTANCES COMPANIES CAN
13 RELY ON THE GOOD FAITH ACTIONS OF THEIR
14 EMPLOYEES?

15 MR. RENARD: OBJECTION, FORM.

16 A. I'M NOT REALLY SURE WHAT
17 YOU'RE ASKING THERE.

18 Q. ARE YOU FAMILIAR -- WELL, YOU
19 CITED IT SO YOU'RE FAMILIAR WITH THE
20 SEDONA CONFERENCE VOLUME ON LITIGATION
21 HOLDS, SECOND EDITION?

22 A. YES.

23 MS. NAJAM: LET ME MARK THAT
24 AS EXHIBIT 7.

25 (GRANDE EXHIBIT 7, SEDONA

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 145

1 CONFERENCE VOLUME 20 , DATED 2019
2 RE: LITIGATION HOLDS , SECOND
3 EDITION , WAS RECEIVED AND MARKED ON
4 THIS DATE FOR IDENTIFICATION .)

5 Q. LET'S GO TO PAGE 408 . JUST
6 FOR THE RECORD , THE EDITION THAT WE'RE
7 LOOKING AT , VOLUME 20 WAS ISSUED IN 2019 ;
8 IS THAT RIGHT , SIR ?

9 A. THAT'S WHAT IT SAYS , YES .

10 Q. AND YOU MENTION THAT YOU ARE A
11 MEMBER OF A WORKING GROUP WITHIN SEDONA ,
12 IS THAT WORKING GROUP 1 ?

13 A. YES .

14 Q. AND WORKING GROUP 1 IS
15 ACTUALLY THE GROUP THAT ISSUED THIS
16 VOLUME , RIGHT , SIR ?

17 A. YES .

18 Q. AND THAT WORKING GROUP IS
19 CALLED WORKING GROUP ON ELECTRONIC
20 DOCUMENT RETENTION AND PRODUCTION , RIGHT ?

21 A. I BELIEVE SO .

22 Q. AND , SORRY , I SHOULD HAVE
23 ESTABLISHED THIS EARLIER , BUT TO BE A
24 MEMBER OF A WORKING GROUP WITHIN SEDONA
25 THERE IS NOT LIKE AN APPLICATION PROCESS ,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 146

1 RIGHT?

2 A. IT'S -- YOU KNOW, YOU BECOME A
3 MEMBER BUT YOU'RE NOT -- YEAH, THERE IS
4 NOT AN INTERVIEW OR ANYTHING LIKE THAT.

5 Q. WELL, THERE IS NO, LIKE,
6 QUALIFICATIONS NEEDED, YOU JUST PAY YOUR
7 ANNUAL FEE AND YOU'RE A MEMBER, RIGHT?

8 A. YES. AND THEN YOU ATTEND
9 EVENTS OR GET INVOLVED TO THE EXTENT YOU
10 WANT.

11 Q. "TO THE EXTENT YOU WANT", IS
12 THAT WAS SAID?

13 A. YES.

14 Q. SO PAGE 4 --

15 A. I WOULD JUST SAY THE GUIDANCE
16 IS NOT JUST FOR MEMBERS, IT'S GUIDANCE
17 PROMULGATED THROUGHOUT THE INDUSTRY.

18 Q. SO MY QUESTION TO YOU BEFORE I
19 HANDED YOU THE DOCUMENT WAS WHETHER UNDER
20 CERTAIN CIRCUMSTANCES COMPANIES CAN RELY
21 ON GOOD FAITH ACTIONS OF THEIR EMPLOYEES
22 IN THE CONTEXT OF PRESERVING DOCUMENTS
23 FOR HOLDS.

24 ON PAGE 408 THERE IS A
25 PARAGRAPH THAT BEGINS WITH "HOWEVER". IT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 147

1 SAYS "SO SEDONA SAYS IN MOST CASES A
2 CAREFUL COMBINATION OF NOTIFICATION AS
3 DESCRIBED ABOVE, COLLECTION AND
4 INDIVIDUAL ACTION SHOULD ENABLE PARTIES
5 TO RELY ON THE GOOD FAITH ACTIONS OF
6 THEIR EMPLOYEES." DID I READ THAT RIGHT?

7 A. YES.

8 Q. AND THEN IT ACTUALLY CITES
9 FROM THE CONCORD CASE TO SAY, "THE FACT
10 THAT THE DEFENDANT ALLOWED INDIVIDUAL
11 EMPLOYEES TO USE DISCRETION WHETHER TO
12 RETAIN EMAIL IS SIMPLY NOT INDICATIVE OF
13 BAD FAITH." DID I READ THAT RIGHT?

14 A. YES.

15 Q. DO YOU HAVE ANY DISAGREEMENT
16 WITH THIS LAST SENTENCE, "RESPONDING
17 PARTIES ARE BEST SITUATED TO EVALUATE THE
18 PROCEDURES, METHODOLOGIES AND
19 TECHNOLOGIES APPROPRIATE FOR PRESERVING
20 AND PRODUCING THEIR OWN ELECTRONICALLY
21 STORED INFORMATION?"

22 MR. RENARD: OBJECTION TO
23 FORM.

24 Q. THE QUESTION WAS WHETHER YOU
25 HAD ANY DISAGREEMENT WITH IT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 148

1 A. NO, I GENERALLY AGREE WITH
2 THAT STATEMENT. THE ISSUE BECOMES IF --
3 IF THE -- THE PROCEDURES, METHODOLOGIES
4 AND TECHNOLOGIES ARE NOT APPROPRIATE FOR
5 PRESERVING AND PRODUCING THEIR OWN
6 ELECTRONICALLY STORED INFORMATION.

7 Q. UNDERSTOOD. BUT TO GET BACK TO
8 MY ORIGINAL QUESTION, CAN WE AGREE THERE
9 IS NO RULE PROHIBITING EMPLOYEES FROM
10 RELYING ON THEIR EMPLOYEES' GOOD FAITH TO
11 FOLLOW LITIGATION HOLD INSTRUCTIONS IN
12 TERMS OF PRESERVING ESI?

13 MR. RENARD: OBJECTION, FORM.

14 A. I WOULD SAY MOST COMPANIES ARE
15 HESITANT AND SHOULD BE HESITANT TO RELY
16 ON GOOD FAITH ACTIONS ALONE. THIS
17 PARAGRAPH ACTUALLY SAYS "A CAREFUL
18 COMBINATION OF NOTIFICATIONS, AS
19 DESCRIBED ABOVE, COLLECTION AND ANY
20 INDIVIDUAL ACTION."

21 IN THE SITUATION THAT'S BEEN
22 PRESENTED TO ME IN THIS CASE I DO NOT
23 BELIEVE THAT THE MEASURES THAT WERE PUT
24 IN PLACE IN THE LITIGATION HOLDS WERE --
25 WAS REASONABLE TO RELY ON, ON THE GOOD

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 149

1 FAITH ACTIONS OR TO RELY ON THE EMPLOYEES
2 IN THE WAY IN WHICH THE LITIGATION HOLD
3 LANGUAGE WAS SET UP.

4 Q. OKAY. UNDERSTOOD. OBJECT AS
5 NONRESPONSIVE.

6 HERE IS MY QUESTION AGAIN. IS
7 THERE A RULE PROHIBITING EMPLOYEES FROM
8 RELYING -- I'M SORRY -- PROHIBITING
9 COMPANIES FROM RELYING ON THEIR
10 EMPLOYEES' GOOD FAITH TO FOLLOW -- I'M
11 GOING TO CHANGE IT NOW -- A LITIGATION
12 HOLD INSTRUCTION THAT INFORMS EMPLOYEES
13 TO RETAIN ESI RELEVANT TO THE HOLD?

14 MR. RENARD: OBJECTION TO
15 FORM.

16 A. CAN YOU REPHRASE THAT?

17 Q. SURE. I'LL ASK A FIVE-WORD
18 QUESTION. IS THERE A -- LESS THAN TEN,
19 HOW ABOUT THAT?

20 IS THERE PER SE RULE SAYING
21 COMPANIES, WHEN YOU ARE PUTTING THOSE
22 HOLD INSTRUCTIONS OUT YOU CAN'T RELY ON
23 GOOD FAITH EMPLOYEES OR GOOD FAITH
24 ACTIONS BY EMPLOYEES?

25 A. MY ANSWER, THERE IS NO RULE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 150

1 HOWEVER, YOU KNOW, IT'S NOT THE INDUSTRY
2 STANDARDS TO RELY ON, ON EMPLOYEES MAKING
3 DECISIONS REGARDING WHAT IS RESPONSIVE OR
4 WHAT SHOULD BE COLLECTED OR PRESERVED.

5 Q. OKAY. WE'LL COME BACK TO
6 THAT.

7 DO YOU AGREE THAT COMPLETE OR
8 BROAD CESSATION OF A PARTY'S ROUTINE
9 COMPUTER OPERATIONS COULD PARALYZE A
10 COMPANY'S ACTIVITIES?

11 A. CAN YOU REPEAT THAT?
12 CESSATION OF?

13 Q. COMPLETE OR BROAD CESSATION OF
14 A PARTY'S ROUTINE COMPUTER OPERATIONS
15 COULD PARALYZE THE PARTY'S ACTIVITIES?

16 A. I THINK THAT'S POSSIBLE.

17 MR. RENARD: OBJECTION TO
18 FORM.

19 Q. YOU SAID IT'S POSSIBLE?

20 A. IT'S A VAGUE STATEMENT.

21 Q. IT'S VAGUE?

22 A. YES, BUT --

23 Q. BUT POSSIBLE?

24 A. AGAIN, I DON'T KNOW WHAT IT'S
25 EXACTLY REFERRING TO.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 151

1 Q. OKAY. DO YOU AGREE THAT UNDER
2 THE FEDERAL RULES THEY ONLY REQUIRE
3 REASONABLE PRESERVATION STEPS?

4 MR. RENARD: OBJECTION, FORM.

5 A. THAT'S ONE REQUIREMENT.

6 Q. IN TERMS OF THE STANDARD FOR
7 THE STEPS THAT A COMPANY MUST TAKE UNDER
8 THE FEDERAL RULES TO PRESERVE RELEVANT
9 ESI, ISN'T THE STANDARD REASONABLENESS?

10 MR. RENARD: OBJECTION, FORM.

11 A. I BELIEVE SO.

12 Q. AND THE FEDERAL RULES DON'T
13 CALL FOR PERFECTION IN PRESERVING ALL
14 RELEVANT ESI, DO THEY?

15 MR. RENARD: SAME OBJECTION.

16 A. THAT'S CORRECT.

17 Q. IN FACT, THAT KIND OF
18 PERFECTION IS OFTEN IMPOSSIBLE, TRUE?

19 A. PERFECTION IS OFTEN
20 IMPOSSIBLE, THAT'S CORRECT.

21 Q. AND THE RULE REQUIRES
22 REASONABLE STEPS TO PRESERVE ALL RELEVANT
23 ESI, TRUE?

24 MR. RENARD: SAME OBJECTION.

25 A. THAT'S MY UNDERSTANDING.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 152

1 Q. LET'S SWITCH GEARS AND TALK
2 ABOUT WHEN IN YOUR VIEW GOOGLE SHOULD
3 HAVE REASONABLY ANTICIPATED THE CLAIMS
4 THAT ARE BEING BROUGHT HERE. AND BEFORE I
5 GO ANY FURTHER, ARE YOU GENERALLY
6 FAMILIAR WITH THE CLAIMS IN THIS LAWSUIT?

7 A. YES.

8 Q. WHAT DID YOU READ TO
9 FAMILIARIZE YOURSELF WITH THE CLAIMS?

10 A. I READ THE COMPLAINT, THE
11 COMPLAINT IN THE CASE AND DEPOSITION
12 TRANSCRIPTS.

13 Q. ANYTHING ELSE?

14 A. EMAILS AND CHATS SURROUNDING
15 THE ISSUES AS WELL. I LEARNED ABOUT THE
16 CASE FROM THE COMPLAINT, THE DEPOSITION
17 TRANSCRIPTS.

18 Q. SORRY. THE CHATS THAT YOU
19 EXCERPT AND TALK ABOUT IN YOUR REPORT,
20 WERE THOSE PROVIDED TO YOU?

21 MR. RENARD: OBJECTION, FORM.

22 A. NO. I MEAN, MANY CHATS WERE
23 MADE AVAILABLE TO ME. I ALSO HAD ACCESS
24 TO ALL CHATS AND DOCUMENTS THAT HAVE BEEN
25 PRODUCED IN THIS CASE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 153

1 Q. OKAY. SO DID YOU, LIKE, RUN
2 SEARCHES IN A DATABASE TO COME UP WITH
3 THE EXAMPLES THAT YOU INCLUDED IN YOUR
4 REPORT OR WAS THAT SET PROVIDED TO YOU?

5 A. I DID RUN SEARCHES IN THE
6 DATABASE.

7 Q. WAS A SET ALSO PROVIDED TO YOU
8 OF HERE ARE CHATS SHOWING SPOLIATION OR
9 SOMETHING TO THOSE -- TO THAT EFFECT?

10 A. YEAH. I WAS -- AGAIN, IN THE
11 APPENDIX TO MY REPORT I LIST ALL THE
12 DOCUMENTS THAT HAD BEEN EITHER PROVIDED
13 TO ME OR THAT I HAD SEARCHED AND FOUND. I
14 DON'T KNOW THE COMBINATION OF WHICH ONES
15 I FOUND AND WHICH ONES WERE, YOU KNOW,
16 PROVIDED TO ME AS DOCUMENTS THAT WERE
17 PRODUCED IN THIS CASE.

18 Q. OKAY. PAGE 31 OF YOUR REPORT
19 THERE IS A HEADING ABOUT MR. MALKIEWICZ'S
20 OPINION THAT YOU'RE STATING YOU ARE
21 REBUTTING. I'M LOOKING AT ROMAN NUMERAL
22 XV. YOU REFERENCE AN OPINION BY HIM THAT
23 "GOOGLE PLACED CUSTODIANS, MORE THAN THE
24 AGREED UPON LIST, ON TIMELY, SUFFICIENT
25 LITIGATION HOLDS." AND THEN YOUR OPINION

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 154

1 IS THAT HE'S INCORRECT. DO YOU SEE THAT?

2 A. GIVE ME ONE SECOND. IT'S 103
3 YOU ARE REFERRING TO?

4 Q. YES. WHAT I JUST READ WAS A
5 HEADER ABOVE IT BUT YES --

6 A. OKAY.

7 Q. -- YOU CAN LOOK AT 103. ARE
8 YOU READY FOR MY QUESTION?

9 A. YES.

10 Q. IS THIS ANOTHER EXAMPLE OF YOU
11 GLEANING FROM MR. MALKIEWICZ'S REPORT HE
12 MAY THINK SOMETHING OR IS THIS A SPECIFIC
13 OPINION THAT HE ACTUALLY HAD, THAT THE
14 LITIGATION HOLDS WERE TIMELY AND
15 SUFFICIENT?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 Q. LET'S DO IT THIS WAY, THE
19 FOOTNOTE -- THE ONLY REFERENCE YOU HAVE
20 HERE IN THIS SECTION TO MR. MALKIEWICZ'S
21 REPORT IS FOOTNOTE 72, RIGHT, SIR?

22 A. YES, YES.

23 Q. AND IN FOOTNOTE 72 YOU CITE TO
24 HIS PARAGRAPHS 20 AND 21, RIGHT? I'M
25 SORRY, 20 AND 31.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 155

1 A. THAT'S CORRECT.

2 Q. LET'S LOOK AT HIS PARAGRAPH
3 20, SO HIS REPORT EXHIBIT 5. HIS
4 PARAGRAPH 20 SAYS NOTHING TO DO ABOUT THE
5 TIMELINESS OF HOLDS, DOES IT?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. MR. MALKIEWICZ'S OPINIONS,
9 INCLUDING IN PARAGRAPH 20 AND OTHER
10 PARAGRAPHS, ALL ASSUME THAT LITIGATION
11 HOLDS WERE PUT IN PLACE AND -- AND WERE
12 EFFECTIVE, THEREFORE, TIMELY AND
13 SUFFICIENT.

14 MS. NAJAM: I'LL OBJECT AS
15 NONRESPONSIVE.

16 Q. WE WERE LOOKING AT PARAGRAPH
17 20, ONE OF THE TWO PARAGRAPHS YOU CITED
18 FOR HIS ALLEGED OPINION THAT THE HOLDS
19 WERE TIMELY AND SUFFICIENT.

20 DOES PARAGRAPH 20 HAVE
21 ANYTHING TO DO WITH THE TIMELINESS OF
22 GOOGLE'S HOLDS?

23 MR. RENARD: OBJECTION TO THE
24 PREFATORY STATEMENT.

25 A. I THINK IT'S RELATED TO HIS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 156

1 OPINION BUT, YOU KNOW, AGAIN, THIS
2 OPINION IS THROUGHOUT HIS REPORT AND, YOU
3 KNOW, IS PART OF ALL OF HIS OPINIONS. IF
4 YOU GO TO PARAGRAPH 59, IN THAT PARAGRAPH
5 HE GETS INTO -- I WAS GOING TOO FAST.

6 ON PAGE 22 OF MR. MALKIEWICZ'S
7 REPORT THERE IS A DISCUSSION THERE AS
8 WELL OF INSTRUCTIONS TO RETAIN PURSUANT
9 TO LITIGATION HOLDS.

10 Q. MR. GRANDE, MY QUESTION WASN'T
11 -- I WILL GET THERE. MY QUESTION WASN'T
12 HAVING TO DO WITH ANY PARAGRAPH OTHER
13 THAN 20. CAN YOU PLEASE GO BACK TO IT?

14 THE QUESTION WAS, IN PARAGRAPH
15 20 MR. MALKIEWICZ DOES NOT OPINE ABOUT
16 THE TIMELINESS OF GOOGLE'S HOLDS, DOES
17 HE?

18 A. NOT SPECIFICALLY IN THAT
19 PARAGRAPH.

20 Q. ALSO IN THAT PARAGRAPH HE
21 DOESN'T TALK ABOUT HOW SUFFICIENT THE
22 HOLDS WERE, DOES HE?

23 A. IT'S NOT DISCUSSED
24 SPECIFICALLY IN THIS PARAGRAPH.
25 ALTHOUGH, HE DOES STATE THAT, YOU KNOW,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 157

1 HE INDICATES THE NUMBER OF EMPLOYEES THAT
2 WERE PLACED ON LITIGATION HOLD AT THAT
3 TIME.

4 Q. OKAY. I DIDN'T ASK ABOUT THAT.

5 A. YEAH.

6 Q. LET'S GO TO THE NEXT PARAGRAPH
7 THAT YOU CITE IN YOUR REPORT, 31. IT'S ON
8 PAGE 14 OF MR. MALKIEWICZ'S REPORT. YOU
9 CITE THIS AS HIM OPINING ABOUT THE
10 TIMELINESS AND SUFFICIENCY OF HOLDS.
11 AGAIN, THIS PARAGRAPH CONTAINS NO SUCH
12 OPINIONS, DOES IT, SIR?

13 A. IN ORDER TO MAKE THE
14 CONCLUSIONS THAT MR. MALKIEWICZ DOES MAKE
15 IN PARAGRAPH 31 AND IN OTHER PARTS OF HIS
16 REPORT, HE DID HAVE -- HE DID ASSUME AS
17 PART OF HIS STATEMENT THERE THAT
18 LITIGATION HOLDS HAD BEEN TIMELY AND
19 SUFFICIENT.

20 Q. DID HE EVER USE THE WORD
21 "TIMELY HOLD", HOLDS WERE "TIMELY"?

22 A. HE DIDN'T INCLUDE ANY SPECIFIC
23 LANGUAGE, BUT THAT'S NOT SURPRISING THEY
24 WOULDN'T SAY THAT SPECIFICALLY.

25 Q. IT'S NOT SURPRISING BECAUSE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 158

1 HE 'S NOT A LAWYER , RIGHT ?

2 MR . RENARD : OBJECTION TO
3 FORM .

4 A . I CAN 'T SAY . THAT 'S NOT WHY --
5 THAT 'S NOT A RELEVANT FACT HERE .

6 Q . LET 'S BACK UP A MINUTE . DID
7 YOU READ MR . MALKIEWICZ 'S ACTUAL
8 QUALIFICATIONS , LIKE AS SHOWN IN HIS CV
9 INCLUDED IN HIS REPORT ?

10 A . YES .

11 Q . HE 'S A STATISTICS DATA
12 ANALYTICS EXPERT . YOU SAW THAT , RIGHT ?

13 A . YES .

14 Q . AND HE , YOU SAW FROM HIS
15 REPORT , WAS HIRED -- SORRY -- WAS ENGAGED
16 TO REBUT THE OPINIONS OF PROFESSOR
17 HOCHSTETLER , RIGHT ?

18 A . YES , THAT 'S IN MY
19 UNDERSTANDING .

20 Q . AND YOU READ PROFESSOR
21 HOCHSTETLER 'S REPORTS IN THIS CASE HAVING
22 TO DO WITH CHAT MESSAGES , RIGHT ?

23 A . YES .

24 Q . AND MR . HOCHSTETLER , HE 'S A
25 COMPUTER SCIENCE EXPERT , RIGHT ?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 159

1 A. THAT'S MY UNDERSTANDING.

2 Q. SO BACK TO WHAT MR. MALKIEWICZ
3 ACTUALLY OPINED, I'M NOT TALKING ABOUT
4 THINGS THAT YOU THINK HE MAY HAVE FOUND,
5 WHAT HE ACTUALLY OPINED, HE NEVER OPINED
6 THAT I HAVE REVIEWED THE LITIGATION HOLDS
7 IN THIS CASE AND THEY WERE SUFFICIENT, HE
8 DIDN'T OPINE THAT, DID HE?

9 MR. RENARD: OBJECTION, FORM.

10 A. MANY OF MR. MALKIEWICZ'S
11 OPINIONS, INCLUDING THE ONE YOU'RE
12 REFERENCING, DO HAVE HIS INTERPRETATION
13 OF LITIGATION HOLDS THROUGHOUT HIS
14 REPORT. AND AS I -- YES.

15 Q. "YES", WHAT?

16 A. THAT WAS THE END OF MY
17 QUESTION.

18 Q. I'M NOT SAYING DID HE TALK
19 ABOUT HOLDS. I'LL ASK MY QUESTION AGAIN.

20 DID MR. MALKIEWICZ FORM AN
21 OPINION IN THIS CASE THAT THE LITIGATION
22 HOLDS ISSUED BY GOOGLE WERE SUFFICIENT
23 UNDER ANY LEGAL STANDARD?

24 MR. RENARD: OBJECTION TO
25 FORM.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 160

1 A. MR. MALKIEWICZ'S OPINIONS
2 ALL -- YOU KNOW, ALL HAD -- YOU KNOW,
3 WERE BASED ON HIS ASSUMPTION, CONCLUSION
4 THAT LITIGATION HOLDS WERE TIMELY AND
5 SUFFICIENT. THAT, YOU KNOW, HE DOESN'T
6 STATE THAT BUT THAT'S -- HE, YOU KNOW,
7 THE OPINIONS HE MAKES ARE RELYING ON THAT
8 BEING THE CASE.

9 Q. HE DOESN'T STATE IT BUT IT IS
10 YOUR OPINION THAT IS BETWEEN HIS LINES
11 SOMEWHERE? IS THAT AN ACCURATE RECAP?

12 A. NO.

13 MR. RENARD: OBJECTION TO
14 FORM.

15 Q. HE DOESN'T STATE IT BUT IT'S
16 YOUR VIEW THEY MUST HAVE ASSUMED IT; IS
17 THAT MORE ACCURATE?

18 A. NO. I THINK ANYONE IN MY
19 PLACE WOULD SEE THAT HE'S MAKING CALLS
20 WITH REGARD TO THAT ISSUE, YOU KNOW,
21 WHETHER -- WHETHER LITIGATION HOLDS WERE
22 TIMELY AND SUFFICIENT. THAT'S -- THAT IS
23 WITHIN PART OF THE OPINIONS THAT HE
24 PROVIDES REQUIRE HIM TO MAKE THAT
25 CONCLUSION.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 161

1 Q. LET'S GET BACK TO YOUR
2 OPINIONS, WHETHER THEY'RE RESPONSIVE TO
3 HIS OR NOT. YOUR OPINION IS THAT A
4 LITIGATION HOLD SHOULD BE IMPLEMENTED
5 WHEN AN ENTITY CREDIBLY CONCLUDES OR
6 SHOULD HAVE CONCLUDED THAT A LITIGATION
7 OR GOVERNMENT INQUIRY IS PROBABLE; IS
8 THAT CORRECT?

9 MR. RENARD: OBJECTION TO THE
10 FORM OF THE QUESTION.

11 A. CAN YOU DIRECT ME TO WHICH WAY
12 YOU'RE REFERENCING?

13 Q. DO YOU NEED TO GO TO YOUR
14 REPORT TO KNOW IF THAT'S YOUR OPINION?

15 A. I WOULD LIKE TO SEE WHERE IN
16 MY REPORT THAT IS.

17 Q. YOU CAN GO TO PARAGRAPH 31,
18 PAGE 105.

19 A. YES. CAN YOU REPEAT YOUR
20 QUESTION?

21 Q. NO, I'LL MOVE ON.

22 DOES IT MATTER TO YOU WHAT
23 KINDS OF CLAIMS A PARTICULAR EVENT CAUSES
24 THE COMPANY TO REASONABLY ANTICIPATE?

25 MR. RENARD: OBJECTION TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 162

1 FORM.

2 A. CAN YOU REPHRASE YOUR
3 QUESTION?

4 Q. I CAN REPEAT IT. WAS THERE
5 SOMETHING CONFUSING IN IT?

6 A. IF YOU REPEAT IT? COULD YOU
7 REPEAT IT?

8 Q. SURE. DOES IT MATTER TO YOU
9 WHAT KINDS OF CLAIMS A PARTICULAR EVENT
10 CAUSES THE COMPANY TO REASONABLY
11 ANTICIPATE?

12 MR. RENARD: SAME OBJECTION.

13 A. YEAH, THE QUESTION ISN'T CLEAR
14 TO ME.

15 Q. ITS UNCLEAR TO YOU. DO YOU
16 AGREE OR DISAGREE WITH THE FOLLOWING
17 STATEMENT: A DUTY TO PRESERVE EVIDENCE
18 ARISES ONLY WHEN A PARTY KNOWS OR
19 REASONABLY SHOULD KNOW THERE IS A
20 SUBSTANTIAL CHANCE THE CLAIM WILL BE
21 FILED AND THE EVIDENCE IN ITS POSSESSION
22 WILL BE POTENTIALLY RELEVANT TO THAT
23 CLAIM.

24 MR. RENARD: OBJECTION, FORM.

25 A. THAT IS A LONG QUESTION. CAN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 163

1 YOU PLEASE REPEAT IT?

2 Q. IN TERMS OF THE EVIDENCE THAT
3 A COMPANY HAS A DUTY TO PRESERVE --

4 A. YES.

5 Q. -- THAT DUTY ARISES ONLY WHEN
6 THE PARTY KNOWS OR REASONABLY SHOULD KNOW
7 THERE IS A SUBSTANTIAL CHANCE THAT A
8 CLAIM WILL BE FILED AND THAT THAT
9 EVIDENCE WILL BE POTENTIALLY RELEVANT TO
10 THAT CLAIM, TRUE?

11 MR. RENARD: SAME OBJECTION.

12 Q. IF I TOLD YOU THAT WAS A QUOTE
13 FROM THE ENRON LITIGATION IN THE FIFTH
14 CIRCUIT IN 2010, DOES IT HELP YOU ANSWER
15 THE QUESTION?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 A. AGAIN, I'M NOT HERE TO PROVIDE
19 LEGAL OPINIONS. THAT'S GETTING INTO WHAT
20 PRECEDENT IS.

21 I CAN TELL YOU WHAT I BELIEVE
22 IS REASONABLE WITH REGARD TO THE
23 IMPLEMENTATION OF LEGAL HOLDS.

24 Q. TO THE EXTENT YOU HAVE OFFERED
25 LEGAL OPINIONS IN YOUR REPORT YOU WANT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 164

1 THE COURT TO SET THOSE ASIDE, RIGHT?

2 A. I HAVE NOT ISSUED --

3 MR. RENARD: LET'S HAVE ANSWER
4 AND QUESTION SEPARATE. AND I HAVE
5 AN OBJECTION TO THE FORM OF THE
6 QUESTION.

7 A. I HAVE NOT PROVIDED LEGAL
8 OPINIONS IN MY REPORT.

9 Q. I GET THAT THAT'S YOUR VIEW.
10 TO THE EXTENT YOU ARE REALLY PROVIDING A
11 LEGAL OPINION, THE COURT SHOULD NOT
12 ENTERTAIN THAT, RIGHT?

13 MR. RENARD: I OBJECT TO THE
14 PREFATORY SENTENCE AND I OBJECT TO
15 THE QUESTION ON THE BASIS OF FORM.

16 MS. NAJAM: OBJECTION,
17 SIDEBAR, OBJECTION FORM WILL DO. I
18 DON'T KNOW IF THIS IS A TIME-EATING
19 TACTIC.

20 MR. RENARD: WE'LL CALL IT
21 SIDEBAR. WE'LL KEEP IT SHORTER.

22 A. AGAIN, I DO NOT BELIEVE I
23 ISSUE, YOU KNOW, LEGAL OPINIONS IN MY
24 REPORT.

25 Q. THAT WOULD BE IMPROPER IF YOU

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 165

1 DID, RIGHT?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. WHETHER IT'S IMPROPER OR NOT,
5 I AM NOT ISSUING LEGAL OPINIONS, I'M
6 GIVING OPINIONS IN MY CAPACITY AS AN
7 EDISCOVERY PROFESSIONAL AND NOT AS A
8 LAWYER.

9 Q. YOU'RE CITING CASE LAW IN YOUR
10 REPORT, RIGHT?

11 MR. RENARD: OBJECTION, FORM.

12 A. CASE LAW INFORMS A LOT OF
13 EDISCOVERY DETERMINATIONS THAT ARE
14 FOLLOWED NOT JUST BY ATTORNEYS BUT
15 EDISCOVERY PRACTITIONERS AND CONSULTANTS.

16 MS. NAJAM: OBJECT AS
17 NONRESPONSIVE.

18 Q. I'M GOING TO ASK YOU PLEASE
19 LISTEN TO MY QUESTIONS AND TRY TO ANSWER
20 THEM. SOME OF THEM REALLY ARE JUST
21 YES/NO.

22 DO YOU CITE TO CASE LAW IN
23 YOUR REPORT?

24 A. YES.

25 MR. RENARD: OBJECTION TO THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 166

1 FORM OF THE QUESTION. I THINK IT
2 WAS ASKED IN THE FIRST HOUR.

3 WE'VE ALSO BEEN GOING A LITTLE
4 BIT MORE THAN AN HOUR. WHENEVER
5 YOU ARE AT A CONVENIENT BREAKING
6 POINT.

7 MS. NAJAM: SURE.

8 Q. WHEN AN EVENT HAPPENS ISN'T IT
9 OFTEN THE CASE THAT THAT EVENT PROVIDES
10 ONLY LIMITED INFORMATION ABOUT THE
11 PERSPECTIVE LITIGATION SO THE SCOPE OF
12 THE INFORMATION THAT SHOULD BE PRESERVED
13 REMAINS UNCERTAIN?

14 MR. RENARD: OBJECTION, FORM.

15 A. I THINK THAT STATEMENT WOULD
16 DEPEND ON THE PARTICULAR CASE INVOLVED.

17 Q. SO DEPENDING ON THE
18 CIRCUMSTANCES IT'S TRUE THAT AN EVENT CAN
19 PROVIDE LIMITED INFORMATION SUCH THAT THE
20 PARTY TRYING TO FIGURE OUT WHAT SHOULD I
21 PRESERVE IS SOMETIMES UNCERTAIN, RIGHT?

22 A. IT COULD BE UNCERTAIN.

23 Q. AND IT'S IMPORTANT NOT TO BE
24 BLINDED TO THIS REALITY BY HINDSIGHT THAT
25 IS ARISING FROM THE FAMILIARITY WITH AN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 167

1 ACTION ONCE IT IS FILED; ISN'T THAT
2 RIGHT, SIR?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. I DON'T KNOW THAT I CAN ANSWER
6 THAT QUESTION WITHOUT KNOWING MORE ABOUT,
7 YOU KNOW -- CAN YOU REPEAT YOUR QUESTION?
8 IT WAS A LITTLE --

9 MS. NAJAM: LET ME JUST MARK
10 ONE MORE EXHIBIT BEFORE WE BREAK.
11 IT'S EXHIBIT 8.

12 (GRANDE EXHIBIT 8, COPY OF
13 FEDERAL RULE OF PROCEDURE 37, WAS
14 RECEIVED AND MARKED ON THIS DATE
15 FOR IDENTIFICATION.)

16 Q. YOU ASKED EARLIER FOR A COPY
17 OF FEDERAL RULE OF PROCEDURE 37, AND SO
18 I'M HANDING THAT TO YOU. SIR, THIS RULE,
19 AT LEAST -- SORRY -- RULE 37, PART (E),
20 THAT IS A RULE THAT YOU ACTUALLY RELIED
21 ON IN FORMING YOUR OPINIONS IN THIS CASE,
22 RIGHT?

23 A. I DO CITE TO IT.

24 Q. YOU DON'T JUST CITE TO IT,
25 IT'S SOMETHING THAT YOU SPECIFICALLY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 168

1 REPRESENTED YOU ARE RELYING ON IN YOUR
2 APPENDIX B; ISN'T THAT TRUE?

3 MR. RENARD: OBJECTION, FORM.

4 A. APPENDIX B INCLUDES ALL
5 DOCUMENTS THAT I HAVE CITED TO IN MY
6 REPORT AS WELL. SO YES, THEY WERE RELIED
7 UPON BUT THAT'S EVERYTHING THAT WAS
8 CITED.

9 Q. I'LL ASK MY QUESTION AGAIN.
10 ISN'T IT TRUE THAT FRCP 37(E), IN
11 PARTICULAR THE ADVISORY COMMITTEE NOTE TO
12 THE 2015 AMENDMENT IS A DOCUMENT THAT YOU
13 RELIED ON IN FORMING YOUR OPINIONS?

14 A. THAT'S TRUE.

15 Q. OKAY. SO LET'S LOOK AT THE
16 ADVISORY COMMITTEE NOTE TO THE 2015
17 AMENDMENT. ON THIS WESTLAW PRINTOUT IT
18 STARTS ON PAGE 13. IN THE SECOND FROM
19 LAST PARAGRAPH, FOURTH SENTENCE IT READS
20 WHAT I PREVIOUSLY ASKED YOU, "OFTEN THESE
21 EVENTS PROVIDE ONLY LIMITED INFORMATION
22 ABOUT THAT PERSPECTIVE LITIGATION."

23 A. SORRY WHICH PARAGRAPH?

24 Q. SECOND TO LAST PARAGRAPH, THE
25 SENTENCE STARTING "OFTEN".

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 169

1 A. WHICH LINE IS THAT?

2 Q. OKAY. SO LET'S DO THIS. SECOND
3 TO LAST PARAGRAPH --

4 A. ON THE PAGE OR IN THE SECTION?

5 Q. ON THE PAGE.

6 A. OKAY.

7 Q. I'M GOING TO READ THE LAST
8 SENTENCE.

9 A. YES.

10 Q. "IT IS IMPORTANT NOT TO BE
11 BLINDED TO THIS REALITY BY HINDSIGHT
12 ARISING FROM FAMILIARITY WITH AN ACTION
13 AS IT IS ACTUALLY FILED." DO YOU SEE
14 WHERE I READ THAT?

15 A. I DON'T, ACTUALLY. SORRY.

16 Q. ARE YOU ON PAGE 13?

17 A. NO, PAGE 14.

18 Q. I TAKE IT YOU ARE NOT GOING TO
19 DISAGREE WITH THE ADVISORY COMMITTEE'S
20 NOTES TO THE 2015 AMENDMENT TO 37(E), ARE
21 YOU, SIR?

22 A. NO, I DIDN'T.

23 Q. OKAY. AND JUST SO OUR ULTIMATE
24 AUDIENCE UNDERSTANDS, WHO PUTS OUT THE
25 FEDERAL RULES OF CIVIL PROCEDURE?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 170

1 MR. RENARD: OBJECTION TO
2 FORM.

3 A. I THINK IT'S A FEDERAL RULES
4 COMMITTEE IN THE FEDERAL JUDICIARY.

5 Q. AND WHO APPOINTS THE MEMBERS
6 OF THE COMMITTEE THAT PROMULGATES THE
7 FEDERAL RULES OF CIVIL PROCEDURE?

8 MR. RENARD: OBJECTION TO
9 FORM.

10 A. I'M NOT SURE HOW THEY'RE
11 ASSIGNED. IT'S THE COURT SYSTEM.

12 Q. CAN WE TRUST THAT THE NOTES TO
13 THE 2015 AMENDMENT WILL ACCURATELY RELAY
14 THE INTENT BEHIND THE RULE CHANGES THAT
15 TOOK PLACE THAT YEAR?

16 MR. RENARD: OBJECTION, FORM.

17 A. IN THE COMMENTARY IT'S
18 PUBLISHED WITH THE RULES, IT'S NOT THE
19 RULES BUT IT'S SUPPORT FOR THE RULES.

20 Q. IT EXPLAINS THE RULES, RIGHT?

21 MR. RENARD: OBJECT TO FORM.

22 A. TO AN EXTENT.

23 Q. DO YOU DISAGREE WITH ANYTHING
24 THAT IS INCLUDED IN THE ADVISORY
25 COMMITTEE'S COMMENTARY TO THE 2015

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 171

1 AMENDMENT PERTAINING TO PART (E)? AND I
2 DON'T WANT TO BURN 30 MINUTES WITH YOU
3 READING IT ON THE RECORD.

4 THIS IS SOMETHING YOU ARE
5 FAMILIAR WITH BEFORE WALKING IN TODAY'S
6 DEPOSITION, ISN'T IT, SIR?

7 A. I THINK BASED ON YOUR
8 QUESTION, I SHOULD READ IT.

9 Q. IT'S A NEW QUESTION. WALKING
10 INTO THIS DEPOSITION YOU HAD ALREADY MADE
11 YOURSELF FAMILIAR WITH THE ADVISORY
12 COMMITTEE NOTES THAT WE'RE LOOKING AT NOW
13 THAT START ON PAGE 13, RIGHT, SIR?

14 A. YES.

15 Q. LET ME ASK YOU THIS, BASED ON
16 YOUR UNDERSTANDING OF THE RULE AND YOUR
17 INDUSTRY STANDARD YOU'RE DRAWING ON -- I
18 WANT TO GIVE YOU A HYPOTHETICAL.

19 SO IF I OWN A RESTAURANT AND I
20 ANTICIPATE A GOVERNMENT INVESTIGATION
21 INTO AN ALLEGED CONSPIRACY WITH THE
22 RESTAURANT DOWN THE STREET FOR PRICE
23 FIXING THE HOT DOGS THAT I SELL, DOES
24 THAT MEAN I SHOULD REASONABLY ANTICIPATE
25 A CLAIM THAT MY HOT DOGS TRANSMITS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 172

1 SALMONELLA?

2 MR. RENARD: OBJECTION, FORM.

3 A. TO THAT HYPOTHETICAL, NO.

4 Q. DO I NEED TO AUTOMATICALLY
5 SUSPEND ANY AUTO DELETION FOR EVERY
6 DOCUMENT ABOUT HOT DOGS?

7 MR. RENARD: SAME OBJECTION.

8 A. CAN YOU REPEAT THE ORIGINAL
9 PREMISE OF THE HYPO?

10 Q. SURE. I OWN A RESTAURANT AND
11 I RECEIVE A NOTICE THAT I MAY BE THE
12 SUBJECT OF AN INVESTIGATION FOR PRICE
13 FIXING HOT DOGS, A CONSPIRACY WITH A
14 COMPETITOR RESTAURANT, THAT'S THE
15 HYPOTHETICAL. DO I NOW NEED TO SUSPEND
16 ANY AUTO DELETION THAT'S ALREADY
17 OCCURRING FOR ALL ELECTRONIC DOCUMENTS
18 ABOUT HOT DOGS?

19 A. NO.

20 Q. WHICH ONES?

21 MR. RENARD: OBJECTION, FORM.

22 Q. I APOLOGIZE FOR THE SILLY
23 HYPOTHETICAL BUT IN MY HYPOTHETICAL WHAT
24 KINDS OF AUTO DELETION MUST I SUSPEND?

25 MR. RENARD: SAME OBJECTION.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 173

1 A. AGAIN, UNDER YOUR
2 HYPOTHETICAL, A LITIGATION HOLD --
3 THERE'S A LOT OF INFORMATION THAT IS NOT
4 THERE. SO BUT A LITIGATION HOLD WOULD
5 NEED TO BE PUT IN PLACE AND DATA WOULD
6 NEED TO BE PRESERVED AND, YOU KNOW -- AND
7 IT WOULD -- YOU HAVE TO DETERMINE WHERE
8 THE -- YOU KNOW, HOW PARTIES COMMUNICATED
9 IN THE RESTAURANT. THERE ARE A LOT OF
10 QUESTIONS FIRST YOU'D HAVE TO ASK BEFORE
11 GETTING TO ANY RETENTION OF OR ANY --
12 YOU'D HAVE TO GET THE INFORMATION FIRST.

13 Q. SURE. BUT THE PUNCHLINE THERE
14 IS IF YOU ARE TRYING TO FIGURE OUT, FOR
15 EXAMPLE, WHAT KIND OF AUTO DELETION NEEDS
16 TO BE SUSPENDED FOR WHAT KINDS OF
17 COMMUNICATION, SOMEBODY NEEDS TO MAKE A
18 REASONABLE DETERMINATION ON THE KINDS OF
19 COMMUNICATIONS, NOT JUST ABOUT HOT DOGS,
20 BUT THAT MAY RELATE TO THE PRICE FIXING
21 CONSPIRACY POTENTIAL INVESTIGATION,
22 RIGHT?

23 A. THE LITIGATION HOLD WOULD HAVE
24 TO DETERMINE THE SCOPE OF WHAT IS BEING
25 PRESERVED.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 174

1 Q. BASED ON WHAT IS REASONABLY
2 ANTICIPATED GIVEN THE EVENT THAT'S
3 PUTTING YOU ON NOTICE, ACCURATE?

4 A. THAT'S FAIR.

5 Q. AND SO WHEN YOU LOOK AT PAGE
6 32 OF YOUR REPORT -- AND I PROMISE WE'LL
7 BREAK SOON -- STARTING ON PARAGRAPH 106
8 --

9 A. PAGE 32. OKAY.

10 Q. OF YOUR REPORT, EXHIBIT 1. IS
11 YOUR BIG PICTURE POINT THAT ALL THESE
12 EVENTS, A THROUGH K, THAT THEY'RE EVENTS
13 THAT SHOULD HAVE PUT GOOGLE ON NOTICE OF
14 POTENTIAL LITIGATION RELATED TO THEIR
15 ACQUISITIONS IN THE DISPLAY ADS BUSINESS?

16 MR. RENARD: OBJECTION, FORM.

17 A. THESE ARE JUST -- THESE ARE
18 NOT ALL OF THE POTENTIAL EMAILS BUT THIS
19 IS A LIST OF SOME EMAILS WHERE I BELIEVE
20 A DUTY TO PRESERVE DOCUMENTS WOULD HAVE
21 BEEN TRIGGERED. AND -- AND YOUR
22 QUESTION, CAN YOU REPEAT YOUR QUESTION,
23 THOUGH, JUST TO MAKE SURE I'M ANSWERING
24 IT?

25 Q. SURE. IN TERMS OF THE DUTY TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 175

1 PRESERVE DOCUMENTS BEING TRIGGERED, THESE
2 LISTED EVENTS YOU HAVE HERE, SHOULD
3 GOOGLE HAVE ANTICIPATED LITIGATION
4 RELATED TO THEIR ACQUISITIONS IN THE
5 DISPLAY AD BUSINESS?

6 A. I BELIEVE A DUTY TO PRESERVE
7 WOULD HAVE BEEN -- OR LITIGATION HOLD
8 WOULD HAVE BEEN TRIGGERED AS EARLY AS
9 THEIR ACQUISITIONS IN THE DISPLAY AD
10 BUSINESS, THAT'S CORRECT.

11 Q. NO, THAT'S NOT MY QUESTION.
12 I'M TRYING TO FIGURE OUT IF YOU HAVE AN
13 OPINION ON THE SCOPE OF NOTICE. SO LET'S
14 PUT ASIDE THE DATES I THINK AS EARLY AS
15 '06, AS LATE AS '13, PUT THAT TO THE
16 SIDE.

17 I'M TRYING TO UNDERSTAND IN
18 YOUR OPINION WHAT WAS GOOGLE -- WHAT
19 SHOULD GOOGLE HAVE ANTICIPATED A
20 LITIGATION ABOUT? IS IT LITIGATION ABOUT
21 THE ACQUISITIONS IN THE DISPLAY AD
22 BUSINESS?

23 A. THAT'S ONE OF THE AREAS, YES.

24 Q. WHAT OTHER AREAS?

25 A. INVESTIGATIONS REGARDING THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 176

1 DISPLAY AD BUSINESS AND THE AD TECH
2 PRACTICE, IN GENERAL.

3 Q. OKAY. SO YOUR OPINION IS THAT
4 EACH ONE OF THESE THINGS WOULD HAVE PUT
5 GOOGLE ON NOTICE OF INVESTIGATIONS INTO
6 AN ENTIRE BUSINESS, PERIOD?

7 MR. RENARD: OBJECTION TO
8 FORM.

9 A. THE ENTIRE BUSINESS OF DISPLAY
10 ADS, YES, THAT WAS AT GOOGLE.

11 Q. SO THAT'S NOT WHAT PARAGRAPH
12 106 SAYS, RIGHT? YOUR SECOND SENTENCE YOU
13 SAY, "IT IS IN MY OPINION THAT GOOGLE WAS
14 AWARE OF AND ANTICIPATED LITIGATIONS AND
15 GOVERNMENT INVESTIGATIONS RELATED TO
16 THEIR ACQUISITIONS IN THE DISPLAY AD
17 BUSINESS", AND THEN YOU HAVE SOME DATES.
18 DID I READ THAT CORRECTLY?

19 A. YES, THAT'S CORRECT.

20 Q. ARE YOU NOW EXPANDING THAT TO
21 INCLUDE JUST ANYTHING IN THE DISPLAY AD
22 BUSINESS?

23 A. THEIR ACQUISITIONS IN THE
24 DISPLAY AD BUSINESS, THAT'S THEIR DISPLAY
25 AD BUSINESS. SO WHEN YOU ARE ACQUIRING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 177

1 COMPANIES AS PART OF YOUR BUSINESS THAT
2 -- THERE SHOULD HAVE BEEN A -- YES, THAT
3 THAT'S RELATED TO THEIR ACQUISITIONS AND
4 DISPLAY AD BUSINESS. SO THE PEOPLE
5 INVOLVED WITH THOSE ACQUISITIONS AND THAT
6 BUSINESS THERE WAS A CREDIBLE
7 ANTICIPATION OF LITIGATION OR
8 INVESTIGATION I BELIEVE AS EARLY AS 2006
9 AND CERTAINLY NO LATER THAN 2013, AS I
10 STATE.

11 Q. IS IT YOUR UNDERSTANDING THAT
12 100% OF GOOGLE'S DISPLAY AD BUSINESS AS
13 OF 2020 WAS ACQUIRED BACK IN 2007?

14 A. NO.

15 MR. RENARD: OBJECTION, FORM.

16 MS. NAJAM: WE CAN TAKE A
17 BREAK NOW.

18 VIDEOGRAPHER: OKAY. THE TIME
19 IS 1:20 P.M. WE ARE GOING OFF THE
20 RECORD.

21 (LUNCH RECESS IS TAKEN.)

22 VIDEOGRAPHER: THE TIME IS
23 2:03 P.M. AND WE ARE BACK ON THE
24 RECORD.

25 Q. MR. GRANDE, I WANT TO PICK UP

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 178

1 WHERE WE LEFT OFF AND THAT WAS YOUR
2 OPINION THAT BEGINS WITH PARAGRAPH 106 OF
3 YOUR REPORT, EXHIBIT 1. IS THAT MR.
4 MALKIEWICZ'S REPORT?

5 A. YES, WRONG REPORT.

6 Q. PAGE 32.

7 A. GOT IT.

8 Q. I WANT TO MAKE SURE I
9 UNDERSTAND YOUR OPINION.

10 IS IT THAT FROM WHENEVER ITS
11 TRIGGER DATE WAS BETWEEN, IN YOUR
12 OPINION, '06 TO 2013, THAT FROM THAT
13 POINT ON GOOGLE HAD A DUTY TO KEEP ON
14 100% OF ITS ESI RELATED TO DISPLAY ADS?

15 A. THAT -- MY OPINION THERE IS
16 THAT RELATES -- IS THAT A DUTY TO
17 PRESERVE REGARDING THE GENERAL ISSUES
18 AROUND A MONOPOLY AND AD TECH WAS
19 TRIGGERED, AGAIN, EITHER AS EARLY AS
20 2006, 2007 AS LATE AS 2013 BY, YOU KNOW,
21 ONE OR MORE OF THESE -- YOU KNOW, THESE
22 DOCUMENTS, OTHER DOCUMENTS THAT WERE
23 PRODUCED IN THE CASE OR LISTED ON THE
24 PRIVILEGE LOG.

25 MS. NAJAM: I'LL OBJECT AS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 179

1 NONRESPONSIVE.

2 Q. I'LL ASK MY QUESTION AGAIN.
3 WHATEVER THAT DATE WAS --

4 A. YES.

5 Q. -- IS IT YOUR OPINION THAT
6 GOOGLE SHOULD HAVE KEPT ALL ESI RELATING
7 TO DISPLAY ADS?

8 MR. RENARD: OBJECTION, FORM.

9 A. NO, NOT ALL ESI RELATING TO
10 DISPLAY ADS BUT DOCUMENTS RELATING TO
11 CUSTODIANS THAT WOULD HAVE BEEN INVOLVED
12 WITH, AGAIN, THE INVESTIGATIONS THAT I
13 BELIEVE, YOU KNOW, WERE STARTING TO TAKE
14 PLACE AND RELATED TO THE LITIGATION, THE
15 LITIGATION THAT WE'RE CURRENTLY DEALING
16 WITH.

17 Q. THE LITIGATION THAT WE'RE
18 CURRENTLY DEALING WITH, WHAT YEAR WAS
19 THAT FILED IN?

20 A. THE INVESTIGATIVE DEMAND WAS
21 AS I NOTED, DECEMBER 2019.

22 Q. THAT WAS A CIVIL INVESTIGATIVE
23 DEMAND THAT GOOGLE PRODUCE CERTAIN
24 INFORMATION, RIGHT? RIGHT, SIR?

25 A. YES, YES.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 180

1 Q. WHEN WAS THE LAWSUIT FILED, DO
2 YOU KNOW?

3 A. I BELIEVE IT WAS 2020.

4 Q. OKAY. SO TAKE ME BACK TO THE
5 YEAR 2000 -- WE'LL PICK 2009, THE CIVIL
6 INVESTIGATIVE DEMAND HASN'T BEEN ISSUED
7 YET, RIGHT?

8 A. 2009, YES.

9 Q. OKAY. SO TELL ME WHAT IS YOUR
10 OPINION OF THE SCOPE OF INFORMATION THAT
11 GOOGLE SHOULD HAVE BEEN RETAINING IN
12 2009? IS IT ANYTHING THAT MAY TOUCH ON
13 THE ALLEGED MONOPOLY IN AD TECH?

14 A. THE SCOPE OF THE INFORMATION
15 THAT SHOULD HAVE BEEN RETAINED AS OF 2009
16 WOULD RELATE TO DOCUMENTS RELATING TO THE
17 ANTITRUST ALLEGATIONS AND INVESTIGATIONS
18 THAT WERE ALREADY KNOWN OR CREDIBLY
19 ANTICIPATED AT THAT POINT IN TIME.

20 Q. OKAY. DO YOU KNOW THE EXTENT
21 TO WHICH GOOGLE DID, IN FACT, IMPLEMENT
22 LEGAL HOLDS IN THE WAKE OF ANY OF THESE
23 EVENTS YOU HAVE LISTED IN PARAGRAPH 106?

24 A. I DON'T BELIEVE I HAVE SEEN
25 DOCUMENTS THAT RELATE TO WHAT WAS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 181

1 PRESERVED, TO THE EXTENT IT'S STILL A
2 PART OF THIS, THE POPULATION THAT WAS
3 PRODUCED TO PLAINTIFFS.

4 Q. MY QUESTION HAD NOTHING TO DO
5 WITH WHAT WAS PRESERVED, SO I'LL ASK
6 AGAIN.

7 DO YOU KNOW THE EXTENT TO
8 WHICH GOOGLE DID, IN FACT, IMPLEMENT LIT
9 HOLDS IN THE WAKE OF ANY OF THESE EVENTS?

10 A. I DO NOT KNOW THE DETAILS.

11 Q. AND HELP ME UNDERSTAND THE
12 TIMING. SO YOU REFERENCE SOME ANTITRUST
13 INVESTIGATIONS IN PARAGRAPHS C AND D, FOR
14 EXAMPLE, OR POTENTIAL INVESTIGATIONS. DO
15 YOU SEE THAT, HAVING TO DO WITH THE
16 ACQUISITION OF DOUBLECLICK?

17 A. THAT'S CORRECT.

18 Q. DO YOU KNOW WHEN ANY OF THE
19 INVESTIGATIONS INTO THAT ACQUISITION
20 CONCLUDED?

21 A. I BELIEVE THAT THE
22 INVESTIGATION BY THE FTC CONCLUDED
23 SOMETIME IN, YOU KNOW, IN THAT PERIOD.
24 BUT IN MY EXPERIENCE, HAVING WORKED ON
25 ANTITRUST MATTERS AND JUST GENERAL -- YOU

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 182

1 KNOW, OVER THE YEARS AND JUST MY GENERAL
2 KNOWLEDGE OF HOW THINGS -- HOW
3 INVESTIGATIONS OPERATE, YOU KNOW, THERE
4 WAS STILL ANTICIPATION OF LITIGATION
5 FOLLOWING THE RESOLUTION OF THE
6 INVESTIGATION BY THE FTC.

7 MS. NAJAM: I'LL OBJECT TO ALL
8 OF THAT AS NONRESPONSIVE. AND I
9 DIDN'T EVEN GET THE YEAR, SO LET'S
10 TRY THAT AGAIN.

11 Q. ANY OF THE INVESTIGATIONS OR
12 POTENTIAL INVESTIGATIONS INTO DOUBLECLICK
13 THAT ARE REFERENCED IN C AND D, WHEN DID
14 THEY CONCLUDE?

15 A. I'M NOT ENTIRELY CERTAIN. I
16 BELIEVE IT WAS PRIOR TO 2009, 2010.

17 Q. IS IT YOUR OPINION THAT ONCE A
18 REGULATORY INVESTIGATION HAPPENS, EVEN
19 AFTER IT ENDS, A COMPANY SHOULD
20 REASONABLY ANTICIPATE THERE MAY BE MORE
21 ON THAT TOPIC?

22 A. IN THIS CASE, YES.

23 Q. WHAT WAS IT THAT -- TELL ME
24 WHAT YOU THINK HAPPENED WITH THE
25 DOUBLECLICK INVESTIGATIONS IN 2007 THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 183

1 MAKES YOU FORM THAT OPINION?

2 A. AT THIS POINT IN TIME,
3 STARTING IN 2007, GOING THROUGH, YOU
4 KNOW, AGAIN, TO 2015 THERE WERE VARIOUS
5 ACQUISITIONS IN THE AD TECH AREA OF
6 GOOGLE THAT WERE UNDER THE INQUIRY, YOU
7 KNOW, VARIOUS INQUIRIES BY REGULATORY
8 AGENCIES LEADING TO POTENTIAL LITIGATIONS
9 AND, IN FACT, MENTIONED BY GOOGLE
10 EMPLOYEES AND THAT'S -- THAT'S MY VIEW.

11 Q. I'M SORRY. TELL ME, IS IT YOUR
12 OPINION THAT FROM 2007 UNTIL INFINITY
13 GOOGLE MUST RETAIN ANY POTENTIAL ESI THAT
14 RELATES TO POTENTIAL ANTITRUST ISSUES
15 WITH DISPLAY ADS?

16 A. MY OPINION IS THAT IN,
17 STARTING IN 2006 AND GOING THROUGH 2013,
18 THERE WERE VARIOUS INVESTIGATIONS AND
19 INQUIRIES THAT WERE BEING FILED BASICALLY
20 DEALING WITH THE SAME ISSUES THAT ARE
21 PART OF THE CIVIL INVESTIGATIVE DEMAND
22 AND THIS -- THIS LITIGATION AND THAT A
23 LITIGATION HOLD SHOULD HAVE BEEN IN PLACE
24 COVERING DOCUMENTS, CORRESPONDENCE
25 RELATED TO THOSE -- RELATED TO THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 184

1 SUBJECT MATTER AT HAND.

2 MS. NAJAM: I'LL OBJECT AS
3 NONRESPONSIVE.

4 Q. SO STARTING FROM WE'LL TAKE
5 YOUR YEAR 2006, ASSUME 2006 WAS THE
6 TRIGGER DATE IN YOUR VIEW. DOES THAT HOLD
7 CONTINUE FOR INFINITY, IN YOUR MIND?

8 MR. RENARD: OBJECTION TO
9 FORM.

10 A. NO.

11 Q. WHAT WOULD IT TAKE, IN YOUR
12 VIEW, FOR GOOGLE TO BE ABLE TO STOP
13 ANTICIPATING MONOPOLY CLAIMS WITH RESPECT
14 TO DISPLAY ADS?

15 A. WHEN GOOGLE CAN CREDIBLY NOT
16 ANTICIPATE FURTHER LITIGATION.

17 Q. GIVE ME AN EXAMPLE OF SUCH AN
18 EVENT.

19 MR. RENARD: OBJECTION, FORM.

20 A. IT MAY GO ON FOR SOME TIME.
21 IT MAY BE AT THE RESOLUTION -- WHEN THE
22 CURRENT CASES ARE RESOLVED. BUT ANY
23 POINT IS IN 2006, 2007 THEY -- THERE WAS
24 A CREDIBLE ANTICIPATION OF FURTHER
25 LITIGATION DUE TO THE -- OVER THESE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 185

1 ACQUISITIONS AND THE POTENTIAL OF A
2 MONOPOLY, ASSERTIONS THAT THERE WAS A
3 MONOPOLY IN THIS AREA.

4 MS. NAJAM: OKAY. I'LL OBJECT
5 AS NONRESPONSIVE.

6 Q. WHAT IS YOUR METHODOLOGY FOR
7 COMING UP WITH AN END DATE, THAT IS WHEN
8 YOU'RE ADVISING COMPANIES AND THEY'RE
9 ASKING YOU, WHEN CAN I PUT AN END TO MY
10 HOLD, WHAT'S YOUR METHOD THERE FOR
11 RESPONDING?

12 MR. RENARD: OBJECTION, FORM.

13 A. THAT ANALYSIS CAN VARY
14 DEPENDING UPON THE INVESTIGATION, THE
15 TYPE OF COMPANY INVOLVED, A NUMBER OF
16 VARIOUS FACTORS. YOU KNOW, IN A SIMPLER
17 CASE, YOU KNOW, AT THE CONCLUSION OF THE
18 LITIGATION AND APPEALS, THE LITIGATION
19 HOLD COULD BE LIFTED. YOU KNOW, IN
20 CERTAIN AREAS, CERTAIN COMPANIES WHERE
21 THERE'S SERIAL LITIGATION, LITIGATION
22 HOLDS HAVE BEEN KEPT IN PLACE FOR A LONG
23 PERIOD OF TIME.

24 MS. NAJAM: OKAY. I'LL OBJECT
25 AS NONRESPONSIVE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 186

1 Q. SO I'M A COMPANY THAT DOESN'T
2 CURRENTLY HAVE AN INVESTIGATION OR
3 LITIGATION PENDING AND I COME TO YOU AND
4 I SAY I'VE HAD THIS HOLD IN PLACE FOR
5 YEARS, MAY I RELEASE IT NOW? TELL ME WHAT
6 YOU, AS AN EDISCOV PROFESSIONAL, TELL ME
7 YOUR ANALYSIS?

8 MR. RENARD: OBJECTION TO
9 FORM.

10 A. I WOULD NEED MORE INFORMATION
11 TO PROVIDE AN ANALYSIS.

12 Q. SO IT'S A CASE-BY-CASE
13 ANALYSIS DEPENDING ON THE CIRCUMSTANCES
14 WHEN YOU WOULD ADVISE A COMPANY TO
15 RELEASE THE HOLD?

16 A. IT IS A CASE-BY-CASE ANALYSIS.

17 Q. DO YOU HAVE AN OPINION ON
18 WHEN, IF EVER, GOOGLE SHOULD HAVE
19 ANTICIPATED LITIGATION ABOUT ANY OTHER
20 ASPECT OF ITS DISPLAY ADS BESIDES
21 MONOPOLIZATION?

22 A. CAN YOU CLARIFY WHAT YOU MEAN
23 BY "OTHER ASPECT"?

24 Q. DO YOU KNOW IF THERE ARE -- SO
25 WHEN A PARTY BRINGS A CLAIM OR A

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 187

1 GOVERNMENT INVESTIGATES THEY ARE
2 INVESTIGATING POTENTIAL WRONGDOING BY THE
3 COMPANY. ARE YOU WITH ME SO FAR?

4 A. YEAH.

5 Q. SO FAR WE'VE TALKED ABOUT
6 ALLEGED WRONGDOING IN THE REALM OF
7 ANTITRUST, THAT IS MONOPOLIZATION, RIGHT?

8 A. YES.

9 Q. DO YOU HAVE AN OPINION ON SOME
10 POINT IN TIME THAT GOOGLE SHOULD HAVE
11 ANTICIPATED CLAIMS ABOUT OTHER KINDS OF
12 ALLEGED WRONGDOING IN THE DISPLAY ADS
13 BUSINESS?

14 A. I'VE ONLY BEEN ASKED TO GIVE
15 OPINIONS IN CONNECTION WITH THIS CASE.

16 Q. CAN YOU CITE ANYTHING, LIKE AN
17 EVENT, TO SHOW THAT BEFORE THE FALL OF
18 2019 GOOGLE SHOULD HAVE ANTICIPATED
19 CLAIMS OVER WHETHER THEIR ADVERTISING
20 TECHNOLOGY WAS DECEPTIVE TO WEBSITES
21 USING THEIR TECHNOLOGY TO SELL ADS?

22 ARE YOU READING -- SORRY, GO
23 AHEAD.

24 A. NO.

25 Q. ARE YOU READING YOUR REPORT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 188

1 LOOKING FOR THAT OPINION? BECAUSE I CAN
2 SAVE YOU SOME TIME AND LET YOU KNOW IT'S
3 NOT IN THERE AND THAT'S WHY I'M ASKING.

4 A. I'M NOT SURE OF THE EXACT DATE
5 THAT A LITIGATION TRIGGER MIGHT HAVE BEEN
6 TRIGGERED IN CONNECTION WITH THAT ONE
7 POINT. BUT DECEPTIVE TRADE PRACTICES,
8 YOU KNOW, WERE PART OF THE -- THE
9 INVESTIGATIONS THAT WERE -- AND ANTITRUST
10 ISSUES THAT WERE STARTING TO BE RAISED IN
11 THAT PERIOD OF TIME.

12 Q. WHICH ONE?

13 A. WHICH ANTITRUST? WHICH ISSUE?

14 Q. SIR, I'M SORRY, I DON'T MEAN
15 TO BE DISRESPECTFUL BUT DID YOU JUST MAKE
16 THAT UP, THAT THESE INVESTIGATIONS --
17 THAT THE INVESTIGATIONS HAD TO DO WITH
18 DECEPTIVE TRADE PRACTICES?

19 MR. RENARD: OBJECTION TO
20 FORM.

21 A. I BELIEVE THAT WAS -- WAS THAT
22 YOUR QUESTION?

23 Q. LET'S LOOK BACK TO YOUR
24 REPORT. EVENTS A THROUGH K, DID ANY OF
25 THEM INVOLVE POTENTIAL OR ACTUAL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 189

1 INVESTIGATIONS OR LITIGATIONS INVOLVING
2 CLAIMS OF DECEPTIVE TRADE PRACTICES?

3 A. THOSE -- THE -- WHAT I LIST IN
4 A THROUGH K DEAL WITH ALLEGATIONS OF
5 MONOPOLIZATION IN THE AREA OF DISPLAY
6 ADS.

7 Q. THANK YOU. SO NOW MY QUESTION
8 IS, PUTTING ASIDE A THROUGH K, CAN YOU
9 CITE TO US ANY OTHER EVENT TO SHOW THAT
10 BEFORE DECEMBER OF 2019 GOOGLE SHOULD
11 HAVE ANTICIPATED CLAIMS INVOLVING
12 DECEPTIVE TRADE PRACTICES IN ITS DISPLAY
13 ADS BUSINESS?

14 A. I'M NOT AWARE OF ONE.

15 Q. AND DID YOU TAKE A LOOK AT THE
16 CID THAT WAS ISSUED IN SEPTEMBER OF 2019?

17 A. I DID AT SOME POINT.

18 Q. AND THAT REFERENCED
19 ALLEGATIONS OF POTENTIAL VIOLATIONS OF
20 THE TEXAS ANTITRUST STATUTE; IS THAT
21 RIGHT?

22 A. I BELIEVE SO.

23 Q. ALL RIGHT. LET'S GO BIG
24 PICTURE A LITTLE BIT BEFORE WE SWITCH
25 GEARS ALTOGETHER.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 190

1 DO YOU AGREE THAT PRESERVATION
2 OBLIGATIONS REQUIRE REASONABLE AND GOOD
3 FAITH EFFORTS?

4 A. YES.

5 Q. AND THAT IT IS UNREASONABLE TO
6 EXPECT PARTIES TO TAKE EVERY CONCEIVABLE
7 STEP OR PROPORTIONATE TO SEPTEMBER EACH
8 INSTANCE OF ESI?

9 A. I BELIEVE THAT, I DON'T THINK
10 THAT WAS APPLICABLE IN THIS CASE, THOUGH.

11 Q. WHEN YOU SAY YOU BELIEVE
12 THAT -- I'M GOING TO REPEAT MY PREMISE.

13 YOU AGREE THAT IT'S
14 UNREASONABLE TO EXPECT PARTIES TO TAKE
15 EVERY CONCEIVABLE STEP TO PRESERVE EACH
16 INSTANCE OF RELEVANT ESI, CORRECT?

17 A. THAT'S CORRECT.

18 Q. OR DISPROPORTIONATE STEPS,
19 RIGHT?

20 A. THAT'S CORRECT.

21 Q. AND YOUR OPINION THAT GOOGLE
22 HAD -- WELL, LET ME ASK YOU THIS. THE
23 OPINIONS WE'VE BEEN TALKING ABOUT,
24 GOOGLE'S DUTY TO PRESERVE, DO THEY ALSO
25 APPLY TO EVERY PIECE OF PAPER THAT FALLS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 191

1 WITHIN THAT SCOPE?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. IF THERE'S A PIECE OF PAPER
5 THAT IS RELATED TO THE ALLEGATION IN THE
6 CASE, YES, IT SHOULD BE PRESERVED.

7 Q. WELL, DO YOU AGREE THAT
8 THERE'S NO BROAD REQUIREMENT TO PRESERVE
9 ALL INFORMATION, WHETHER ELECTRONIC OR ON
10 PAPER?

11 MR. RENARD: OBJECTION, FORM.

12 A. I THINK THAT THERE'S AN
13 OBLIGATION TO PRESERVE POTENTIALLY
14 RESPONSIVE INFORMATION IN -- YEAH. SO
15 THAT'S, YES, THAT'S THE OBLIGATION.

16 Q. AND IN FACT, PRESERVING EVERY
17 SHRED OF PAPER, EVERY EMAIL OR ELECTRONIC
18 DOCUMENT, EVERY BACKUP TAPE, THAT WOULD
19 CRIPPLE LARGE CORPORATIONS, WOULDN'T IT?

20 A. IN CERTAIN SITUATIONS, YES.

21 Q. WHILE WE'RE TALKING ABOUT
22 PAPER, IS IT YOUR OPINION THAT EVER SINCE
23 THE TRIGGER DATE, WHATEVER THE COURT
24 DECIDES IT IS, ANY EMPLOYEE WHO HAS ANY
25 -- SORRY -- WHO MAY HAVE OR CREATE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 192

1 RELEVANT DOCUMENTS SHOULD BE PREVENTED
2 FROM THROWING AWAY PAPER?

3 A. IF THEY HAVE POTENTIALLY
4 RESPONSIVE DOCUMENTS, PAPER DOCUMENTS
5 THAT CAN'T BE EASILY SEPARATED OUT, YES,
6 I THINK THAT PAPER SHOULD BE PRESERVED IF
7 IT'S A FILE, FOR EXAMPLE.

8 Q. AND IS THERE A DIFFERENCE
9 BETWEEN INSTRUCTING EMPLOYEES TO KEEP
10 THAT PAPER VERSUS TAKING AWAY THEIR TRASH
11 CANS?

12 MR. RENARD: OBJECTION, FORM.

13 A. IN TERMS OF COLLECTING THAT
14 PAPER, IF A SOUND PROCESS IS PUT IN PLACE
15 THAT'S DEFENSIBLE, THAT THAT -- THAT'S
16 WHAT SHOULD BE DONE.

17 Q. I'M SORRY. THAT WAS NOT IN MY
18 QUESTION. I WILL OBJECT AS NONRESPONSIVE.

19 IS THERE A DIFFERENCE, AS
20 SOMEONE WHO GIVES DISCOVERY ADVICE,
21 BETWEEN TELLING EMPLOYEES DON'T THROW
22 AWAY RELEVANT PAPER VERSUS REMOVING THEIR
23 TRASH CANS?

24 MR. RENARD: OBJECTION, FORM.

25 A. I CAN'T ANSWER THAT QUESTION.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 193

1 IT DOESN'T MAKE SENSE.

2 Q. AND IT DOESN'T MAKE SENSE
3 BECAUSE YOU'VE NEVER ADVISED ANY COMPANY
4 TO REMOVE THEIR TRASH CANS, HAVE YOU?

5 A. NO.

6 Q. HAVE YOU EVER ADVISED ANY
7 COMPANY TO TELL ITS EMPLOYEES TO KEEP
8 EVERY SINGLE STICKY NOTE OR SHRED OF
9 PAPERS IN THEIR OFFICES WHETHER OR NOT IT
10 RELATES TO A LITIGATION HOLD?

11 A. NO.

12 Q. HAVE YOU EVER -- ARE YOU
13 FAMILIAR WITH WHAT A WHITEBOARD IS?

14 A. YES.

15 Q. AND THE WHOLE PURPOSE OF A
16 WHITEBOARD IS IT'S EXPECTED TO BE ERASED
17 AND REUSED REGULARLY, RIGHT?

18 A. YES.

19 Q. HAVE YOU EVER ADVISED A
20 COMPANY TO REMOVE ALL WHITEBOARDS FROM
21 THEIR OFFICES ONCE THEY ANTICIPATE
22 LITIGATION?

23 A. NO.

24 Q. LET'S CHANGE GEARS AND TALK
25 ABOUT THE CHAT METADATA LOGS THAT WERE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 194

1 PRODUCED IN THIS LAWSUIT FOR FIVE
2 PARTICULAR CUSTODIANS. ARE YOU WITH ME ON
3 WHAT I'M TALKING ABOUT?

4 A. YES.

5 Q. DID YOU PERSONALLY REVIEW ANY
6 METADATA THAT GOOGLE PRODUCED WITH
7 RESPECT TO THE FIVE CUSTODIANS?

8 A. I SAW THE METADATA THAT HAD
9 BEEN PRODUCED BUT MY REPORT DID NOT
10 INCLUDE ANALYSIS OF THE METADATA.

11 Q. WHEN YOU SAY YOU SAW THE
12 METADATA, YOU WERE ABLE TO ACTUALLY VIEW
13 THE CSV FILES THAT WERE PRODUCED?

14 A. I SAW WHAT KIND OF METADATA
15 WAS IN THE CSV FILE. SO, YEAH, I SAW IT.
16 I DIDN'T ANALYZE THE DATA, THOUGH.

17 Q. WHEN YOU SAY "I DIDN'T ANALYZE
18 THE DATA", YOU MEAN YOU DIDN'T DO WHAT
19 PROFESSOR HOCHSTETLER DID IN TERMS OF
20 WRITING SCRIPTS TO RUN STATISTICS ON THE
21 CODE; IS THAT WHAT YOU'RE SAYING?

22 A. YES, I DID NOT -- I SAW THE
23 FILES, SAW WHAT WAS IN THE FILE BUT I DID
24 NOT PERFORM ANY ANALYSIS.

25 Q. AND WOULD YOU BE QUALIFIED TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 195

1 DO ANALYSIS ON THE DATA IN THE WAY THAT
2 DR. HOCHSTETLER DID?

3 A. I DON'T BELIEVE SO.

4 Q. LIKE, WOULD YOU HAVE BEEN ABLE
5 TO COUNT UP THE NUMBER OF "HISTORY OFF"
6 MESSAGES SENT BY ANYBODY IN THAT 68 DAYS?

7 A. NO.

8 Q. THAT'S SOMETHING THAT REQUIRES
9 A COMPUTER SCIENCE EXPERTISE; IS THAT
10 RIGHT?

11 A. YES, I BELIEVE SO.

12 Q. OKAY. I'M GOING TO MARK AS THE
13 NEXT EXHIBIT THE DECLARATION THAT YOU
14 SIGNED ON DECEMBER 9TH, AS SOON AS I FIND
15 IT.

16 (GRANDE EXHIBIT 9, DECLARATION
17 OF IGNATIUS GRANDE DATED DECEMBER
18 9, 2024, WAS RECEIVED AND MARKED ON
19 THIS DATE FOR IDENTIFICATION.)

20 Q. CAN YOU CONFIRM FOR US THAT
21 THIS IS INDEED -- THIS BEING EXHIBIT 9 --
22 THE DECLARATION YOU SIGNED FOR SUBMISSION
23 IN SUPPORT OF THE MOTION FOR SANCTIONS?

24 A. IT IS. IT'S NOT EXCLUDING THE
25 EXHIBITS BUT THIS IS THE DECLARATION.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 196

1 Q. THAT WOULD HAVE BEEN A VERY
2 LARGE EXHIBIT, AS IN EXHIBIT TO YOUR
3 DEPOSITION.

4 LET'S GO TO PAGE 20, PLEASE.
5 AT THE VERY BOTTOM OF THIS YOU DECLARED
6 UNDER THE PENALTY OF PERJURY THAT
7 EVERYTHING IN HERE WAS TRUE AND CORRECT,
8 RIGHT, SIR?

9 A. YES.

10 Q. AND YOU UNDERSTAND THAT WHEN
11 YOU SUBMIT A DECLARATION TO COURT YOU ARE
12 PURPORTING TO HAVE PERSONAL KNOWLEDGE OF
13 THE THINGS THAT ARE INCLUDED IN YOUR
14 DECLARATION, RIGHT?

15 A. YES.

16 Q. IN PARAGRAPH V HERE YOU WROTE,
17 "GOOGLE EMPLOYEES UNDER A LITIGATION HOLD
18 FOR THIS CASE LIKELY SENT MILLIONS OF
19 CHAT MESSAGES WITH THE GOOGLE CHAT
20 HISTORY SETTING OFF EVERY YEAR." DO YOU
21 SEE THAT?

22 A. I DO.

23 Q. AND THEN YOU CITE TO
24 DR. HOCHSTETLER'S DEPOSITION. DO YOU SEE
25 THAT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 197

1 A. I DO.

2 Q. IS PARAGRAPH V THAT I JUST
3 READ, IS THAT PART OF YOUR EXPERT OPINION
4 IN THIS CASE OR DID YOU JUST MEAN TO
5 PARROT WHAT DR. HOCHSTETLER OPINES?

6 A. THIS IS NOT MY REBUTTAL EXPERT
7 REPORT, BUT I DO CITE PROFESSOR
8 HOCHSTETLER'S REPORT FOR THIS, FOR THIS
9 STATEMENT THAT I MADE IN THE DECLARATION,
10 AND I RELY ON IT.

11 Q. SIR, IS V WHAT I ALREADY READ,
12 IS THAT AN OPINION THAT YOU ARE OFFERING
13 IN THIS CASE?

14 MR. RENARD: OBJECTION, FORM.

15 A. YES.

16 Q. BUT, SIR, YOU JUST TOLD US YOU
17 WEREN'T EVEN -- DON'T EVEN HAVE THE
18 QUALIFICATIONS TO PERFORM THE ANALYSIS
19 THAT DR. HOCHSTETLER DID TO COME UP WITH
20 THAT COUNT. DO YOU RECALL THAT?

21 A. I DO. THIS OPINION IS NOT
22 RELIANT JUST ON PROFESSOR HOCHSTETLER'S
23 TESTIMONY OR REPORT, I SHOULD SAY.

24 Q. TELL US ALL THE WORK THAT YOU
25 DID TO DETERMINE THAT GOOGLE EMPLOYEES

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 198

1 UNDER A HOLD LIKELY SENT MILLIONS OF
2 "HISTORY OFF" MESSAGES EVERY YEAR?

3 A. I CAME TO THIS CONCLUSION
4 BASED ON SEVERAL FACTORS AND SEVERAL
5 DOCUMENTS THAT I REVIEWED IN THE COURSE
6 OF PUTTING TOGETHER, DRAFTING THIS
7 DECLARATION, INCLUDING BUT NOT LIMITED TO
8 PROFESSOR HOCHSTETLER'S REPORT WHERE HE
9 PROVIDES ANALYSIS REGARDING THE NUMBER OF
10 GOOGLE CHATS THAT WERE SENT WITH "HISTORY
11 OFF" EVERY YEAR.

12 I OFTEN DEAL WITH STATISTICAL
13 ISSUES IN THE CONTEXT OF EDISCOVERY AND I
14 FOUND HIS METHODOLOGY, HIS ANALYSIS TO BE
15 SOUND. BUT THAT WAS ONLY ONE PART OF, YOU
16 KNOW, MY FINDINGS IN THIS CASE THAT WOULD
17 SUPPORT THE FACT THAT MILLIONS OR THE
18 OPINION THAT MILLIONS OF GOOGLE CHAT
19 MESSAGES WITH THE GOOGLE CHAT "HISTORY
20 OFF" WOULD HAVE BEEN SENT EVERY YEAR.

21 YOU KNOW, A COUPLE OTHER
22 FACTORS THAT WOULD TIE INTO THIS WERE MY
23 REVIEW OF DEPOSITION TRANSCRIPTS,
24 INCLUDING SEVERAL THAT INDICATED THEY
25 SENT HUNDREDS OF CHATS PER DAY, SOME UP

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 199

1 TO 500 PER DAY, WHICH ACTUALLY EXCEEDED
2 THE NUMBERS AS PART OF THE ASSUMPTIONS OF
3 PROFESSOR HOCHSTETLER. THE FACT THAT MANY
4 -- MANY GOOGLE EMPLOYEES DID NOT CHANGE
5 FROM THE DEFAULT SETTINGS IN GOOGLE CHAT
6 WHICH WERE "HISTORY OFF" UP UNTIL
7 FEBRUARY OF 2023, THAT MANY OTHER GOOGLE
8 EMPLOYEES WERE CONFUSED BY WHETHER
9 HISTORY WAS ON OR OFF WHEN THEY WERE
10 SENDING CHATS. IN FACT, NOTING IN CERTAIN
11 SITUATIONS THAT THE "OFF" BUTTON LOOKED
12 LIKE IT WAS ON OR THE ON BUTTON LOOKED
13 LIKE IT WAS OFF. AND ALSO THE FACT THAT
14 MANY CHATS THAT WERE PRODUCED APPEAR TO
15 BE OF A SWISS CHEESE NATURE WHERE THE
16 "HISTORY ON" WAS ONLY ON FOR PART OF THE
17 CONVERSATION AND IT WAS DIFFICULT FOR OR
18 IMPOSSIBLE FOR EMPLOYEES TO TURN "HISTORY
19 ON" BECAUSE THE OTHER EMPLOYEE, IF THEY
20 TURNED "HISTORY OFF" CHATS WOULD BE LOST
21 IN THE MIDDLE OF A CONVERSATION.

22 I ALSO LEARNED FROM MR.
23 MALKIEWICZ'S DEPOSITION EARLIER THIS WEEK
24 THAT IN SOME SITUATIONS AFTER 24 HOURS
25 HISTORY WOULD AUTOMATICALLY GO OFF IN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 200

1 CERTAIN CHATS .

2 Q. OKAY. THANK YOU FOR THAT
3 INFORMATION, WHICH I WILL MOVE TO STRIKE
4 AS NONRESPONSIVE .

5 I'M NOT ASKING FOR THE BASIS
6 OF YOUR OPINION, SO WE'RE GOING TO GO
7 BACKWARDS .

8 I WANTED TO KNOW THE WORK THAT
9 YOU DID. JUST WHAT YOU DID DO? AND I
10 HEARD THAT YOU READ DR. HOCHSTETLER'S
11 ANALYSIS, RIGHT?

12 A. THAT'S CORRECT .

13 Q. AND THEN THE SECOND THING I
14 HEARD YOU DO IS YOU REVIEWED SOME
15 DEPOSITIONS WHERE FOLKS TESTIFIED ABOUT
16 THE FREQUENCY OF CHAT USAGE?

17 A. THAT'S CORRECT .

18 Q. OKAY. AND JUST AS A REMINDER,
19 MY QUESTION IS ABOUT YOUR OPINION ABOUT
20 HOW MANY WERE SENT WITH "HISTORY OFF",
21 OKAY?

22 THE THIRD THING IS YOU
23 REVIEWED SOME DOCUMENTS AND YOU TOLD US
24 WHAT THEY SHOWED YOU THINGS LIKE
25 CONFUSION, THINGS LIKE SWISS CHEESE .

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 201

1 HAVE WE NOW CONCLUDED WITH THE
2 WORK THAT YOU PERSONALLY DID TO FORM THIS
3 CONCLUSION THAT MILLIONS WERE SENT PER
4 YEAR WITH "HISTORY OFF"?

5 MR. RENARD: OBJECTION, FORM.

6 A. BASED UPON THE INFORMATION
7 THAT I REVIEWED IN THIS CASE, INCLUDING
8 PROFESSOR HOCHSTETLER'S REPORT, I DO
9 BELIEVE THAT -- THAT -- WHAT I SAY HERE
10 THAT, "GOOGLE EMPLOYEES UNDER LITIGATION
11 FOR THIS CASE LIKELY SENT MILLIONS OF
12 CHAT MESSAGES WITH THE GOOGLE CHAT
13 HISTORY SETTING OFF EVERY YEAR."

14 Q. DID YOU TAKE ANY MEDICATION
15 DURING THE LUNCH BREAK THAT WOULD AFFECT
16 YOUR ABILITY TO ANSWER QUESTIONS?

17 MR. RENARD: OBJECTION TO THE
18 FORM OF THE QUESTION.

19 Q. I'M NOT BEING DISRESPECTFUL,
20 THAT'S A SERIOUS QUESTION.

21 A. NO.

22 Q. MY QUESTION WAS THE WORK YOU
23 DID. I DON'T WANT TO HEAR YOUR OPINION
24 AGAIN.

25 HAVE WE NOW COVERED ALL THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 202

1 WORK THAT YOU PERFORMED TO OFFER THE
2 OPINION IN PARAGRAPH V IN YOUR
3 DECLARATION?

4 YOU REVIEWED DR. HOCHSTETLER'S
5 WORK, YOU REVIEWED SOME DEPOSITIONS AND
6 YOU REVIEWED SOME DOCUMENTS. IS THERE
7 ANYTHING ELSE YOU DID?

8 A. EVERYTHING ELSE I REVIEWED IN
9 THIS CASE, THE POLICIES AS WELL.

10 Q. DID YOU DO ANY QUANTITATIVE
11 ANALYSIS TO COME UP WITH THE NUMBER OF
12 MILLIONS WITH "HISTORY OFF" PER YEAR?

13 A. NO.

14 Q. OKAY. NOW, IN YOUR REPORT YOU
15 ALSO HAVE AN OPINION ABOUT THE
16 SUFFICIENCY OF THE AMOUNT OF DATA IN THE
17 LOGS FOR PURPOSES OF EXTRAPOLATING
18 OVERALL MESSAGE VOLUME IN THE CASE.

19 A. A-HUM.

20 Q. DID YOU DO ANY QUANTITATIVE
21 ANALYSIS TO ARRIVE AT THAT OPINION?

22 MR. RENARD: I THINK YOU SAID
23 REPORT BUT I GUESS YOU MEAN
24 DECLARATION.

25 MS. NAJAM: NO, I MEAN REPORT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 203

1 I'M SORRY. WOULD YOU LIKE TO LOOK
2 AT YOUR REPORT?

3 THE WITNESS: IF YOU CAN GIVE
4 ME THE PARAGRAPH.

5 Q. PAGE 20, PARAGRAPH 96. TO SAVE
6 TIME I WILL TAKE YOU TO THE SENTENCE.
7 IT'S THE ONE THAT SPLITS OVER ONTO THE
8 NEXT PAGE.

9 A. A-HUM.

10 Q. DO YOU SEE THAT SENTENCE I'M
11 TALKING ABOUT, THE AMOUNT OF DATA --

12 A. I DO.

13 Q. -- THAT'S PROVIDED BY THE
14 LOGS?

15 DID YOU DO ANY QUANTITATIVE
16 ANALYSIS TO REACH THAT OPINION?

17 A. I'M AN EXPERT IN EDISCOVERY
18 AND IN CONNECTION WITH EDISCOVERY I DO
19 DEAL WITH CALCULATIONS OF THIS NATURE AND
20 IN VARIOUS SITUATIONS AND IT'S MY OPINION
21 THAT THE DATA, AS I SAY HERE, THAT'S
22 PROVIDED BY THE LOGS IS SUFFICIENT TO
23 PROVIDE A GOOD EXAMPLE OF THE OVERALL
24 MESSAGING VOLUMES OF THE CUSTODIANS IN
25 THIS CASE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 204

1 Q. YOU JUST READ TO ME THE
2 SENTENCE AND I DIDN'T ASK YOU FOR THAT.

3 THE QUESTION, AGAIN, IS
4 WHETHER YOU DID ANY QUANTITATIVE ANALYSIS
5 TO ARRIVE AT THAT CONCLUSION THAT YOU
6 JUST READ BACK TO ME?

7 A. NO, I DID NOT PERFORM
8 QUANTITATIVE ANALYSIS.

9 Q. DO YOU HAVE ANY DEGREES OR
10 FORMAL EDUCATION IN STATISTICS?

11 A. NO.

12 Q. DO YOU HOLD YOURSELF OUT AS A
13 STATISTICS EXPERT?

14 A. I HOLD MYSELF OUT AS A
15 STATISTICS EXPERT IN THE CONTEXT OF
16 EDISCOVERY.

17 Q. IN THE CONTEXT OF EDISCOVERY,
18 YOU SAID?

19 A. YES.

20 Q. DO YOU HOLD YOURSELF OUT --
21 LET ME ASK YOU THIS, HOW MANY TIMES HAVE
22 YOU BEEN HIRED TO DETERMINE THE NUMBER OF
23 UNSENT MESSAGES WITH A PARTICULAR
24 TIMEFRAME? HAVE YOU EVER DONE THAT?

25 A. NOT THAT SPECIFICALLY, NO.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 205

1 Q. AND HOW MANY -- HAVE YOU EVER
2 BEEN HIRED TO GIVE AN OPINION ON WHETHER
3 A PARTICULAR SUBSET OF CUSTODIANS IN A
4 SUBSET OF A PERIOD, WHETHER THAT'S TRULY
5 REPRESENTATIVE OF A LARGER GROUP OF
6 CUSTODIANS OVER A LARGER TIME PERIOD, IS
7 THAT SOMETHING YOU'VE DONE?

8 MR. RENARD: OBJECTION, FORM.

9 A. CAN YOU REPHRASE THAT OR
10 RESTATE THAT LAST QUESTION?

11 Q. SURE. WHAT PROFESSOR
12 HOCHSTETLER --

13 A. CAN YOU RESTATE THE QUESTION?

14 Q. NO, I'M GOING TO MAKE IT
15 EASIER.

16 SO WHAT PROFESSOR HOCHSTETLER
17 DID IS HE FIGURED OUT THE NUMBER OF SENT
18 MESSAGES THAT WERE OFF THE RECORD FOR A
19 CERTAIN NUMBER OF DAYS FOR A CERTAIN
20 NUMBER OF EMPLOYEES, RIGHT?

21 A. NUMBER OF MESSAGES THAT WERE
22 SENT WITH "HISTORY OFF" FOR CERTAIN DAYS,
23 YES.

24 Q. AND THEN HE OPINES THAT THAT'S
25 A REPRESENTATIVE OF EVERYBODY ELSE, ALL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 206

1 THE OTHER LIT HOLD CUSTODIANS FOR THE
2 REST OF THE YEAR; IS THAT RIGHT?

3 A. YES, THAT WAS THE INFORMATION
4 HE WAS PROVIDED.

5 Q. HAS ANYONE EVER HIRED YOU TO
6 DO THAT KIND OF ANALYSIS?

7 A. IN THE CONTEXT OF MY
8 EDISCOVERY WORK, YOU KNOW, WE OFTEN HAVE
9 TO EXTRAPOLATE NUMBERS BASED UPON WHAT WE
10 WERE PROVIDED AND SOMETIMES THAT'S
11 DETERMINING THE EMAILS OR DOCUMENTS ARE
12 MISSING FROM A CERTAIN PERIOD OF TIME
13 BECAUSE WE HAVE A LOT MORE FROM A
14 DIFFERENT PERIOD OF TIME. SO, YOU KNOW,
15 IN THE CONTEXT OF EDISCOVERY I DEAL WITH
16 THOSE ISSUES IN DIFFERENT -- IN DIFFERENT
17 WAYS.

18 Q. SO IN THE CONTEXT OF
19 EDISCOVERY, WHAT PERCENTAGE OF YOUR TOTAL
20 POPULATION OF DATA IS ENOUGH, IN TERMS OF
21 STATISTICALLY ENOUGH FOR YOU TO
22 EXTRAPOLATE?

23 MR. RENARD: OBJECTION, FORM.

24 A. IN EDISCOVERY WE DEAL WITH THE
25 DATA WE'RE PROVIDED AND WE HAVE TO MAKE,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 207

1 YOU KNOW, ESTIMATES, FOR EXAMPLE, HOW
2 MANY DOCUMENTS NEED TO BE REVIEWED IN A
3 CASE AND, AGAIN, WE WILL DEAL WITH THE
4 INFORMATION THAT WE'RE PROVIDED, WHATEVER
5 IT IS. IN THIS CASE, PROFESSOR
6 HOCHSTETLER WAS ONLY GIVEN INFORMATION
7 FOR FIVE CUSTODIANS AND MADE HIS ANALYSIS
8 BASED ON THAT. HAD HE HAD ACCESS TO
9 ADDITIONAL DATA HE WOULD HAVE
10 INCORPORATED THAT AS WELL.

11 MS. NAJAM: I'LL OBJECT AS
12 NONRESPONSIVE.

13 Q. I'M NOT ASKING YOU TO
14 SPECULATE ABOUT WHAT PROFESSOR
15 HOCHSTETLER WOULD HAVE DONE. LET ME ASK
16 YOU A DIFFERENT QUESTION.

17 CAN YOU POINT TO ANY INDUSTRY
18 STANDARD WITHIN YOUR INDUSTRY OF
19 EDISCOVERY THAT THE AMOUNT OF DATA THAT
20 PROFESSOR HOCHSTETLER HAD IS ENOUGH TO
21 EXTRAPOLATE ACROSS HUNDREDS OF CUSTODIANS
22 FOR AN ENTIRE YEAR?

23 MR. RENARD: OBJECTION TO THE
24 SIDEBAR.

25 A. AS I MENTIONED IN CONNECTION

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 208

1 WITH MY PRIOR ANSWER, EDISCOVERY OFTEN
2 REQUESTS -- OFTEN REQUIRES EXTRAPOLATING
3 ESTIMATES AND CALCULATION BASED ON THE
4 DATA THAT'S AVAILABLE IN A GIVEN CASE.

5 Q. I UNDERSTAND THAT. I'M SORRY.
6 GO AHEAD.

7 A. GO AHEAD.

8 MS. NAJAM: SO I'LL OBJECT AS
9 NONRESPONSIVE AND I'LL REPEAT MY
10 QUESTION.

11 Q. CAN YOU POINT TO ANY INDUSTRY
12 STANDARD WITHIN THE INDUSTRY OF
13 EDISCOVERY THAT THE AMOUNT OF DATA
14 PROFESSOR HOCHSTETLER HAD WAS ENOUGH TO
15 EXTRAPOLATE ACROSS HUNDREDS OF CUSTODIANS
16 FOR AN ENTIRE YEAR?

17 A. AGAIN, I'M BASING, ON MY
18 EXPERIENCE IN THE EDISCOVERY INDUSTRY AND
19 THE STANDARDS AND PRACTICE PEOPLE I'VE
20 WORKED WITH CASES I'VE WORKED ON, I
21 BELIEVE THAT PROFESSOR HOCHSTETLER MADE
22 AN ESTIMATE BASED ON THE INFORMATION HE
23 WAS PROVIDED AND THAT WOULD BE -- YOU
24 KNOW, THAT WOULD BE AN ACCEPTABLE
25 ESTIMATE UNDER EDISCOVERY STANDARDS AND

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 209

1 PRACTICES TO UNDERSTAND WHAT AMOUNT OF
2 DATA THAT YOU'RE DEALING WITH.

3 MS. NAJAM: I'LL OBJECT AS
4 NONRESPONSIVE.

5 Q. CAN YOU CITE FOR ME WHAT
6 EDISCOVERY STANDARD YOU'RE REFERRING TO
7 WHEN YOU SAY UNDER THAT STANDARD THAT
8 DATA WAS ENOUGH TO EXTRAPOLATE?

9 A. AS WE'VE TALKED ABOUT, THERE
10 AREN'T WRITTEN RULES FOR EVERY ISSUE THAT
11 WE DEAL WITH IN EDISCOVERY CASES.

12 Q. ARE YOU OPINING THAT GOOGLE IS
13 DOING SOMETHING WRONG OR IN VIOLATION OF
14 INDUSTRY STANDARD BY KEEPING THOSE
15 BACK-END LOGS FOR ITS CHAT SYSTEM THAT
16 SPAN 68 DAYS INSTEAD OF INDEFINITELY?

17 MR. RENARD: OBJECTION, FORM.

18 A. IN THIS CASE WHERE THESE LOGS
19 ARE THE ONLY INFORMATION AVAILABLE TO
20 SHOW THE NUMBER OF CHATS THAT WERE
21 ACTUALLY SENT DURING A GIVEN PERIOD OF
22 TIME, IT'S MY BELIEF THAT THEY SHOULD
23 HAVE BEEN MAINTAINED FOR A LONGER PERIOD
24 OF TIME.

25 Q. HOW LONG?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 210

1 A. LONGER THAN 68 DAYS.

2 Q. BUT YOU CAN'T -- YOU DON'T
3 HAVE AN OPINION ON HOW MANY MORE DAYS?

4 A. ANYTHING MORE WOULD HAVE BEEN
5 BETTER THAN WHAT WAS PROVIDED.

6 Q. SO -- OKAY. IN OPINING THAT
7 GOOGLE SHOULD HAVE KEPT THEM FOR LONGER,
8 YOUR POINT IS THE LONGER THE BETTER; IS
9 THAT ACCURATE?

10 A. THE MORE INFORMATION, YES, THE
11 BETTER TO DETERMINE THE NUMBER OF EMAILS
12 -- EXCUSE ME -- GOOGLE CHATS THAT WERE
13 SENT WITH "HISTORY OFF".

14 Q. I'LL START WITH MY ORIGINAL
15 QUESTION THEN. DID GOOGLE VIOLATE ANY
16 STANDARD OF PRESERVATION BY HAVING ITS
17 METADATA LOGS ROLL, THAT IS BEING WRITTEN
18 OVER EVERY 68 DAYS?

19 MR. RENARD: OBJECTION, FORM.

20 A. IT'S MY OPINION THAT AFTER
21 THEY WERE -- YES, THEY SHOULD HAVE BEEN
22 PRESERVED BECAUSE THEY WERE RELEVANT TO
23 THIS CASE AT THAT POINT IN TIME.

24 Q. AT WHAT POINT IN TIME?

25 A. WHEN THIS -- WHEN THEY WERE --

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 211

1 WHEN THE GOOGLE CHAT ISSUE FIRST AROSE .

2 Q. WHEN WAS THAT?

3 A. AT LEAST AS OF THE DATE THAT
4 THIS LOG COVERED FROM LATE 2022 TO EARLY
5 2023 , PROBABLY EARLIER IF THEY WERE AWARE
6 THAT THIS WAS THE ONLY RECORDING OF CHATS
7 AND WHAT WAS SENT .

8 Q. HAVE YOU EVER ADVISED ANY
9 COMPANY THAT IT SHOULD KEEP ITS METADATA
10 LOGS , THAT IS METADATA ABOUT IM SYSTEMS ,
11 INFINITE?

12 TO PUT ANOTHER WAY , HAVE YOU
13 EVER ADVISED A COMPANY THAT , OH , WELL ,
14 THESE BACK-END LOGS YOU HAVE FOR YOUR
15 CHAT SYSTEM , LET'S STOP THE OVERRIDING
16 PROCESS , KEEP THEM GOING?

17 MR. RENARD : OBJECTION , FORM .

18 A. I HAVE DIRECTED CLIENTS TO
19 PRESERVE LOGS IN CONNECTION WITH
20 DIFFERENT TYPES OF CASES .

21 Q. THAT WAS NOT QUITE MY
22 QUESTION , SO I'LL REPEAT IT .

23 THIS IS VERY SPECIFIC . HAVE
24 YOU EVER ADVISED A COMPANY TO STOP
25 OVERRIDING YOUR BACK-END CHAT SYSTEM

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 212

1 METADATA LOGS?

2 A. NO, AND THAT'S NOT WHAT I SAID
3 SHOULD BE THE CASE HERE.

4 Q. OKAY. CAN YOU NAME ONE CASE
5 THAT IS, LIKE, LAW, LAWSUIT WHERE A
6 COMPANY GOT IN TROUBLE FOR NOT PRESERVING
7 A METADATA LOG, THAT IS A LOG THAT SHOWS
8 ACTIVITY ON THE INSTANT MESSAGING BUT NOT
9 THE ACTUAL MESSAGES FOR -- GOTTEN IN
10 TROUBLE FOR NOT KEEPING THAT LOG GOING
11 LONGER THAN IT DID?

12 A. AT THIS TIME I CAN'T THINK OF
13 A CASE.

14 Q. UNTIL THIS YEAR ARE YOU AWARE
15 OF THE PLAINTIFFS IN THIS CASE EVER
16 ASKING FOR ANY BACK-END LOGS FOR GOOGLE
17 CHAT?

18 A. I DON'T KNOW THE DATE OF THE
19 REQUEST FOR THE LOGS. ALL I KNOW IS IT
20 WAS PRIOR TO PROFESSOR HOCHSTETLER'S
21 REPORT.

22 Q. AND YOU KNOW THAT THE LOGS
23 WERE ORIGINALLY CREATED AND PRODUCED IN A
24 DIFFERENT LAWSUIT, RIGHT?

25 A. I DO KNOW THAT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 213

1 Q. ARE YOU FAMILIAR WITH THE CASE
2 THAT PEOPLE CALL PLAY?

3 A. I AM.

4 Q. EXCEPT FOR THE PLAY CASE CAN
5 YOU NAME FOR US ANY OTHER CASE WHERE A
6 COMPANY WAS EVEN ASKED TO PRODUCE THESE
7 KINDS OF LOGS, THAT IS METADATA CHAT
8 LOGS?

9 A. I HAVEN'T PERFORMED THAT
10 RESEARCH TO LIST CASES.

11 MS. NAJAM: OKAY. WE'RE GOING
12 TO SWITCH GEARS BUT I DON'T THINK
13 WE'VE BEEN GOING AN HOUR BUT I HAVE
14 ZERO SENSE OF TIME SO SOMEONE
15 SHOULD TELL ME.

16 MR. RENARD: WE HAVE, LIKE,
17 TEN MINUTES OR SO. IF YOU WANT TO
18 TAKE A BREAK NOW, THAT'S FINE WITH
19 US.

20 MS. NAJAM: NO, WE CAN KEEP
21 GOING.

22 Q. SO EARLIER -- AND IF YOU WANT
23 TO GO WITH ME IN YOUR REPORT, WE'RE GOING
24 TO FLIP TO PAGE 13.

25 A. IN THE REPORT?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 214

1 Q. YES, SIR. A PARAGRAPH THAT WE
2 LOOKED AT ALREADY, 67.

3 I'M GOING TO MARK THE NEXT
4 EXHIBIT 10.

5 (GRANDE EXHIBIT 10, EMAIL FROM
6 KENT WALKER AND [REDACTED] DATED
7 SEPTEMBER 16, 2008, WAS RECEIVED
8 AND MARKED ON THIS DATE FOR
9 IDENTIFICATION.)

10 Q. CAN YOU PLEASE CONFIRM THAT
11 EXHIBIT 10 IS THE 2008 EMAIL FROM KENT
12 WALKER AND [REDACTED] THAT WE TALKED
13 ABOUT EARLIER TODAY?

14 A. YES.

15 Q. OKAY. AND IT'S THE DOCUMENT
16 YOU CITE IN FOOTNOTE 35 OF YOUR REPORT AS
17 EVIDENCE OF AN ATTEMPT TO UNDERMINE
18 INVESTIGATIONS IN CASES THAT WERE
19 STARTING TO FORM, RIGHT, SIR?

20 A. AS I ALREADY ANSWERED, THIS IS
21 ONE OF SEVERAL CASES THAT WOULD BE THE
22 BASIS FOR THAT OPINION, YES.

23 Q. YOU SAID ONE OF SEVERAL CASES?

24 A. SEVERAL DOCUMENTS. EXCUSE ME.

25 Q. I WILL ASK YOU ABOUT SOME

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 215

1 MORE.

2 I WANT TO READ WHAT'S ACTUALLY
3 IN THE MEMO -- SORRY -- EMAIL STARTING
4 WITH THE SECOND PARAGRAPH.

5 A. OF WHICH EMAIL?

6 Q. [REDACTED] EMAIL.

7 A. THE BOTTOM ONE?

8 Q. WELL, THAT'S THE ONE THAT
9 YOU'RE CITING, RIGHT, THE BOTTOM EMAIL?

10 A. YES, BUT THERE'S TWO EMAILS ON
11 THE PAGE.

12 Q. OKAY. HE WRITES THAT,
13 "ANYTHING YOU WRITE CAN BECOME SUBJECT TO
14 REVIEW IN LEGAL DISCOVERY, MISCONSTRUED
15 OR TAKEN OUT OF CONTEXT AND MAY BE USED
16 AGAINST YOU OR US IN WAYS YOU WOULDN'T
17 EXPECT. WRITING STUFF THAT'S SARCASTIC,
18 SPECULATIVE OR NOT FULLY INFORMED
19 INEVITABLY CREATES PROBLEMS IN
20 LITIGATION." I'LL PAUSE THERE.

21 IS THERE SOMETHING THAT YOU
22 ARE OPINING IS WRONG WITH WHAT I READ SO
23 FAR IN TERMS OF TELLING EMPLOYEES?

24 A. NOT THAT SENTENCE.

25 Q. AND THEN HE SAYS, "IN YOUR

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 216

1 COMMUNICATIONS PLEASE AVOID STATING LEGAL
2 CONCLUSIONS. SPECULATION ABOUT WHETHER
3 SOMETHING MIGHT BREACH A COMPLEX CONTRACT
4 OR WHETHER IT MIGHT VIOLATE A LAW
5 SOMEWHERE IN THE WORLD IS OFTEN WRONG AND
6 RARELY HELPFUL, SO PLEASE DO THINK TWICE
7 BEFORE YOU WRITE ABOUT HOT TOPICS. DON'T
8 COMMENT BEFORE YOU HAVE ALL THE FACTS AND
9 DIRECT QUESTIONS REGARDING CONTINUING
10 LITIGATION HOLDS AND ANY LEGAL AND/OR
11 REGULATORY MATTERS INVOLVING GOOGLE TO
12 THE FRIENDLY, ALBEIT LAWYERLY, FOLKS AT
13 -- ", AND THERE'S AN EMAIL FOR LIT HOLDS,
14 RIGHT?

15 A. YES.

16 Q. HOW ABOUT THAT SECOND PART
17 THAT I READ, DO YOU SEE ANYTHING WRONG
18 WITH THOSE INSTRUCTIONS?

19 A. IT'S MY VIEW IN THAT SENTENCE
20 HE'S STARTING TO COACH EMPLOYEES ABOUT
21 NOT STATING ISSUES IN WAYS THAT THEY
22 WOULD BE COLLECTED OR HIT ON SEARCH TERMS
23 FOR POTENTIALLY AN ANTITRUST OR RELATED
24 MATTER.

25 Q. OH, DID HE USE THE WORD

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 217

1 "SEARCH TERMS" ?

2 A. NO.

3 Q. DID HE USE THE WORD

4 "ANTITRUST" ?

5 A. NO.

6 Q. GOT IT.

7 A. NOT THERE.

8 Q. SO LET'S KEEP READING IN THE
9 NEXT PARAGRAPH AFTER THE WORD "SECOND".
10 I'M GOING TO PICK UP AT THE SECOND
11 SENTENCE. HE SAYS, "WE END UP REVIEWING
12 MILLIONS OF PAGES OF THESE COMMUNICATIONS
13 AS PART OF PRODUCING DOCUMENTS."

14 A. I'M SORRY. I SEE WHERE YOU
15 ARE. OKAY. GO AHEAD.

16 Q. WELL, WE CAN GO BACKWARDS.
17 WHEN HE SAYS "SECOND", HE THEN REFERENCES
18 THAT THERE IS OTHER FORMS OF EMAIL
19 COMMUNICATIONS BESIDES -- SORRY -- OTHER
20 FORMS OF ELECTRONIC COMMUNICATIONS
21 BESIDES EMAIL. DO YOU SEE THAT?

22 A. YES.

23 Q. OKAY. NOW I'M GOING TO START
24 PARAPHRASING, SINCE APPARENTLY I'VE LOST
25 MY ABILITY TO READ PROPERLY.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 218

1 HE THEN REFERENCES REVIEWING
2 MILLIONS OF PAGES IN REGULATORY AND
3 LITIGATION MATTERS. DO YOU SEE THAT?

4 A. YES.

5 Q. AND THEN HE SAYS, "WE'RE
6 WORKING TO STREAMLINE AND SIMPLIFY THAT
7 PROCESS." DO YOU SEE THAT?

8 A. I DO.

9 Q. AND, SIR, BY THE WAY, YOU'RE
10 FAMILIAR WITH THIS EMAIL BEFORE THIS
11 DEPOSITION, RIGHT?

12 A. I'VE SEEN IT, YES, CITED IN MY
13 REPORT.

14 Q. IT IS AFTER TALKING ABOUT THAT
15 DOCUMENT REVIEW THAT THEY'RE WORKING TO
16 STREAMLINE THAT THE ANNOUNCEMENT IN THE
17 CHANGE IN CHAT IS THEN ANNOUNCED, RIGHT,
18 SIR?

19 A. YES.

20 Q. AND IN THAT ANNOUNCED CHANGE
21 IT STARTS, "TO HELP AVOID INADVERTENT
22 RETENTION OF INSTANT MESSAGES WE HAVE
23 DECIDED TO MAKE OFF THE RECORD THE GOOGLE
24 CORPORATE DEFAULT SETTING FOR GOOGLE
25 TALK." AND IT IS THIS CHANGE IN CORPORATE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 219

1 SETTING THAT YOU WERE CRITICAL OF IN YOUR
2 REPORT, RIGHT, MR. GRANDE?

3 A. AMONGST OTHER THINGS, YES.

4 Q. AND BY THE WAY, THIS
5 INSTRUCTION RELATED TO THE CHANGE -- I'M
6 SORRY -- THIS ANNOUNCEMENT ON THE CHANGE
7 SPECIFICALLY TELLS FOLKS WHAT TO DO WHEN
8 THEY'RE ON LITIGATION HOLD, RIGHT?

9 A. WHICH PART ARE YOU REFERRING
10 TO?

11 Q. FOURTH SENTENCE FROM THE LAST
12 IT SAYS, "IF YOU'VE RECEIVED NOTICE".
13 IT'S ABOUT HALFWAY. IT SAYS, "IF YOU'VE
14 RECEIVED NOTICE THAT YOU ARE SUBJECT TO A
15 LITIGATION HOLD AND YOU MUST CHAT
16 REGARDING MATTERS COVERED BY THAT HOLD,
17 PLEASE MAKE SURE THAT THOSE CHATS ARE ON
18 THE RECORD."

19 A. YES, THAT'S MENTIONED.

20 Q. AND WE KNOW THAT "ON THE
21 RECORD" MEANS TO TELL FOLKS TO MAKE SURE
22 THAT THE HISTORY IS ON, RIGHT?

23 A. THAT'S WHAT THAT MEANS.

24 Q. DO YOU AGREE THAT FOR
25 COMPANIES ONE OF THE BIGGEST DATA RISKS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 220

1 IS HAVING UNCHECKED DATA VOLUMES?

2 MR. RENARD: OBJECTION, FORM.

3 A. FOR SOME COMPANIES THAT'S A
4 CONCERN, YES.

5 Q. AND DO YOU RECALL EVER
6 SUGGESTING TO INHOUSE COUNSEL THAT THEY
7 SHOULD ACTUALLY MAKE REGULAR DATA
8 DELETION A PART OF THEIR PROCESS?

9 A. THAT'S SOMETHING THAT I WOULD
10 RECOMMEND TO COMPANIES, YES.

11 Q. WHY?

12 A. I MEAN, IF THERE'S NO
13 LITIGATION HOLD IN PLACE, DATA SHOULD NOT
14 BE KEPT FOREVER.

15 Q. WHY NOT?

16 A. IT CAN BE BUT, YOU KNOW, FOR A
17 COMPANY THAT HAS SPACE LIMITATIONS OR
18 ISSUES REGARDING THE AMOUNT OF DATA
19 THEY'RE STORING, WHICH IS NOT AN ISSUE IN
20 THIS CASE, I -- THAT THERE -- YOU KNOW,
21 THERE COULD BE DEFENSIBLE DELETION OF OLD
22 DATA THAT'S -- THAT'S NOT REQUIRED TO BE
23 KEPT ANYMORE, ASSUMING THERE IS NO
24 LITIGATION HOLD IN PLACE.

25 Q. OKAY. SIR, THIS ADVICE THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 221

1 YOU HAVE GIVEN ABOUT MAKING DATA DELETION
2 A PART OF YOUR USUAL PROCESS, THAT'S NOT
3 BEEN LIMITED TO COMPANIES WITH SPACE
4 LIMITATIONS, HAS IT?

5 A. THERE ARE DIFFERENT FACTORS
6 THAT COULD AFFECT WHICH COMPANIES WOULD
7 WANT TO PUT IN PLACE A POLICY THAT
8 DELETES DATA AFTER CERTAIN PERIODS OF
9 TIME.

10 Q. SO THAT WAS NOT MY QUESTION.
11 THE DATA -- THE ADVICE THAT YOU HAVE
12 GIVEN TO COMPANIES TO MAKE IT A REGULAR
13 PART OF THEIR PROCESS, GET RID OF OLD
14 DATA YOU DON'T NEED, THAT ADVICE HAS NOT
15 BEEN LIMITED TO COMPANIES FACING
16 RESTRICTIONS ON STORAGE SPACE, IS IT?

17 A. AGAIN, EACH COMPANY HAS
18 CERTAIN SPECIFIC REQUIREMENTS, IT'S NOT
19 LIMITED TO -- TO A SPECIFIC TYPE OF
20 COMPANY, BUT COMPANIES CAN HAVE IN PLACE
21 RETENTION POLICIES THAT CALL FOR DATA TO
22 BE DELETED AFTER CERTAIN PERIODS OF TIME.

23 Q. THAT WAS NOT MY QUESTION, SO
24 I'LL TRY IT AGAIN.

25 DON'T YOU CONSIDER IT A BEST

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 222

1 PRACTICE TO MAKE REGULAR DATA DELETION A
2 PART OF A COMPANY'S PROCESS?

3 A. I WOULD SAY THAT DEPENDS ON
4 THE FACTORS AT ISSUE FOR THAT PARTICULAR
5 COMPANY.

6 Q. AND IN ADDITION TO DATA VOLUME
7 THERE IS OTHER REASONS FOR A COMPANY TO
8 HAVE DATA DELETION A REGULAR PART OF ITS
9 ONGOING PROCESS, RIGHT? FOR EXAMPLE, TO
10 PREVENT PRIVACY VIOLATIONS.

11 A. YES.

12 Q. ANOTHER EXAMPLE IS A COMPANY
13 COULD BE HACKED AND YOU MIGHT AS WELL
14 HAVE ALREADY GOTTEN RID OF INFORMATION
15 THAT WAS OBSOLETE TO BEGIN WITH, RIGHT?

16 A. YES, THAT'S CORRECT.

17 THE WITNESS: SHOULD WE --

18 MR. RENARD: WOULD YOU LIKE TO
19 TAKE A BREAK?

20 THE WITNESS: I'D LIKE TO USE
21 THE BATHROOM.

22 VIDEOGRAPHER: TIME IS 3:02

23 P.M. WE'RE GOING OFF THE RECORD.

24 (RECESS IS TAKEN.)

25 VIDEOGRAPHER: THE TIME IS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 223

1 3:21 P.M. WE ARE BACK ON THE
2 RECORD.

3 Q. MR. GRANDE, BY THE WAY, AM I
4 MISPRONOUNCING YOUR NAME? IS THIS A AND
5 --

6 A. YOU HAVE IT RIGHT. LIKE
7 STARBUCKS OR ARIANNA.

8 Q. BEFORE THE BREAK WE WERE
9 TALKING ABOUT SOME BEST PRACTICE GUIDANCE
10 YOU HAD PARTICIPATED IN RELAYING TO
11 INHOUSE. I WANT TO RETURN TO THAT TOPIC.

12 CAN WE AGREE THAT FOR A
13 COMPANY A WELL-PLANNED RETENTION POLICY
14 WILL REDUCE THE DATA THAT'S BEING SAVED
15 AS THE COMPANY AND ITS EMPLOYEES WILL
16 KNOW WHAT THEY CAN AND CANNOT DELETE?

17 A. THAT'S A FAIR STATEMENT.

18 Q. AND CAN WE AGREE THAT REDUCING
19 THE AMOUNT OF ESI CAN ACTUALLY MAKE
20 COLLECTING DATA AND COMPLYING WITH
21 DISCOVERY REQUESTS MUCH MORE MANAGEABLE?

22 A. THAT'S A FAIR STATEMENT.

23 Q. NOW, BACK TO THE 2008 MEMO
24 FROM MR. COUGHRAN AND MR. WALKER, EXHIBIT
25 10. BACK IN THAT TIMEFRAME ISN'T IT TRUE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 224

1 THAT FEDERAL RULE 37(E), THE RULE
2 REGARDING SANCTIONS FOR ESI, WAS VERY
3 DIFFERENT BACK THEN?

4 A. IT DID CHANGE AFTER THAT DATE.

5 Q. BUT IT WAS COMPLETELY
6 REWRITTEN IN DECEMBER OF 2015 -- SORRY --
7 IT WAS COMPLETELY REWRITTEN IN THE
8 DECEMBER 2015 AMENDMENTS, RIGHT?

9 A. IT CHANGED. I WOULDN'T SAY IT
10 WAS COMPLETELY REWRITTEN BUT IT WAS
11 CHANGED IN THE 2015 RULES.

12 Q. LET ME HAND YOU WHAT I'M
13 MARKING AS EXHIBIT 11.

14 (GRANDE EXHIBIT 11, APPENDIX
15 A14, CORPORATE LEGAL DEPARTMENTS,
16 AUTHORED BY IGNATIUS GRANDE WAS
17 RECEIVED AND MARKED ON THIS DATE
18 FOR IDENTIFICATION.)

19 Q. DID YOU WRITE EXHIBIT 11?

20 A. YES.

21 Q. AND YOU WROTE IT WHILE YOU
22 WERE AT BRG, CORRECT?

23 A. I UPDATED IT AT BRG.

24 Q. GOT IT. AND AT THE VERY TOP IT
25 SAYS APPENDIX A14. WAS THIS AN APPENDIX

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 225

1 TO SOMETHING ELSE?

2 A. YES. THIS IS AN APPENDIX OR
3 CHAPTER TO -- I BELIEVE IT'S IN MY CV,
4 THE TITLE OF THE TREATISE.

5 Q. WAS IT CALLED ELECTRONIC
6 DISCOVERY -- NO, SORRY.

7 MR. RENARD: OR THE CV
8 ATTACHED TO YOUR REPORT?

9 A. RIGHT. THIS IS A CHAPTER IN
10 CORPORATE LEGAL DEPARTMENTS.

11 Q. OH, SO IF YOU LOOK AT PAGE 2
12 IT ACTUALLY SAYS CORPORATE LEGAL
13 DEPARTMENTS. I JUST DIDN'T REALIZE, IS
14 THAT THE TITLE OF THE PUBLICATION?

15 A. CORRECT.

16 Q. WAS IT ALSO THE INTENDED
17 AUDIENCE FOR THIS CHAPTER THAT IS
18 CORPORATE INHOUSE COUNSEL?

19 A. AT LEAST IN PART I WOULD SAY.
20 I DON'T KNOW WHO BUYS THE BOOK.

21 Q. IS IT IS PHYSICAL BOOK?

22 A. IT IS A TREATISE TYPE BOOK
23 THAT GETS UPDATED. I BELIEVE THERE'S
24 ALSO AN ONLINE EDITION.

25 Q. GOT IT. AND AM I RIGHT YOU

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 226

1 WROTE THIS IN 2019?

2 A. I ORIGINALLY WROTE IT AN
3 EARLIER DATE BUT IT WAS UPDATED AS
4 RECENTLY AS 2019.

5 Q. OKAY. SO LET'S GO TO PAGE 9
6 UNDER SANCTIONS RISK, THE THIRD SENTENCE
7 THAT BEGINS WITH THE REFERENCE TO THE
8 RULE. LET ME KNOW WHEN YOU'RE THERE.

9 A. OKAY. I SEE THAT.

10 Q. YOU WROTE, "RULE 37(E) OF THE
11 FEDERAL RULES OF CIVIL PROCEDURE WHICH
12 GOVERNS SANCTIONS FOR FAILURE TO PRESERVE
13 ESI WAS COMPLETELY REWRITTEN IN THE
14 DECEMBER 2015 AMENDMENTS IN ORDER TO
15 PROVIDE A UNIFORM STANDARD FOR WHICH
16 COURTS CAN GIVE AN ADVERSE INFERENCE
17 INSTRUCTION OR IMPOSE OTHER SANCTIONS TO
18 REMEDY ESI LOSS." THAT'S WHAT YOU WROTE,
19 SIR, RIGHT?

20 A. I DID. THAT IS WHAT I WROTE,
21 YES.

22 Q. AND THAT IS ACCURATE?

23 A. YES, THAT'S WHAT I WROTE.

24 Q. AND ACTUALLY -- SORRY, THE
25 REVISION COMPLETELY REPEALED AND REPLACED

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 227

1 WHAT HAD PREVIOUSLY BEEN KNOWN AS RULE
2 37(E)'S SAFE HARBOR PROVISION WHICH
3 BARRED SANCTIONS WHEN A PARTY LOST
4 INFORMATION AS A RESULT OF THE GOOD FAITH
5 OPERATION ELECTRONICALLY -- OF AN
6 ELECTRONIC SYSTEM. DID I READ THAT RIGHT,
7 SIR?

8 A. WHEN I SAID IT CHANGED, THAT
9 WAS THE CHANGE THAT TOOK PLACE IN 2015.

10 Q. AND NOT JUST CHANGE, IT WAS
11 COMPLETELY REWRITTEN TO PROVIDE THIS NEW
12 STANDARD, RIGHT?

13 A. THAT'S FAIR. THAT'S HOW I
14 WROTE THIS, YES.

15 Q. AND BEFORE THAT CHANGE THERE
16 WAS A SAFE HARBOR, AS YOU DESCRIBED, THAT
17 WHEN FOLKS WERE IN GOOD FAITH JUST
18 OPERATING YOUR ELECTRONIC SYSTEMS IN A
19 ROUTINE MANNER, RIGHT?

20 A. YES.

21 Q. AFTER THE YEAR 2015 CAN YOU
22 CITE FOR US ANY MASS COMMUNICATION OR
23 MASS TRAINING AT GOOGLE THAT IN YOUR
24 OPINION ENCOURAGED EMPLOYEES TO GO OFF
25 THE RECORD TO AVOID CREATING SOME KIND OF

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 228

1 EVIDENCE?

2 MR. RENARD: OBJECTION, FORM.

3 Q. AND IF YOU NEED HELP, THE PART
4 OF YOUR REPORT THAT ADDRESSES THE -- THIS
5 TOPIC THAT WE HAVEN'T ALREADY LOOKED AT
6 IS ON PAGE 43, PARAGRAPH 132.

7 A. AS FAR AS TRAINING, AS I
8 REFERENCE IN THAT PARAGRAPH, I DO
9 REFERENCE AN UNDATED INTERNAL GOOGLE
10 COMMUNICATE WITH CARE TRAINING BUT AS --
11 AS IT STATES IT WAS UNDATED.

12 Q. SO SITTING HERE TODAY -- SO
13 LET'S READ WHAT YOU WROTE IN PARAGRAPH
14 132. YOU OPINE THAT, "GOOGLE GUIDED ITS
15 EMPLOYEES TO 'FIND WAYS TO NOT PUT IN
16 WRITING'" -- I'LL WAIT FOR YOU TO GET
17 THERE, PAGE 132 -- "TO NOT PUT IN WRITING
18 POTENTIALLY RESPONSE" -- DID YOU MEAN
19 "RESPONSIVE?"

20 A. I BELIEVE I DID.

21 Q. -- "ANTITRUST DISCUSSIONS."

22 SO ARE YOU ABLE TO POINT TO US
23 ANY INSTRUCTIONS TO THE ENTIRE COMPANY OR
24 LARGE GROUPS WITHIN THE COMPANY TO DO
25 THAT AFTER THE CURRENT VERSION OF RULE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 229

1 37(E) CAME INTO BEING?

2 A. THAT PARAGRAPH I DON'T CITE TO
3 COMMUNICATIONS THAT TOOK PLACE AFTER
4 2015. THAT BEING SAID, AGAIN, YOU KNOW,
5 IT'S MY UNDERSTANDING THAT COMMUNICATE
6 WITH CARE TRAINING WAS NOT A ONE-TIME
7 TRAINING. AND BASED UPON THE CHATS AND
8 EMAILS THAT I HAVE SEEN IN THIS CASE,
9 THAT CULTURE OR THAT -- YOU KNOW, THE
10 IDEA OF KEEPING "HISTORY OFF" WAS
11 SOMETHING THAT WAS FOLLOWED AND
12 IMPLEMENTED THROUGH 2023, YOU KNOW FROM
13 MY REVIEW OF DOCUMENTS IN THIS CASE.

14 MS. NAJAM: OKAY. I'LL OBJECT
15 AS NONRESPONSIVE.

16 Q. YOUR UNDERSTANDING THAT
17 COMMUNICATE WITH CARE TRAININGS CONTINUED
18 TO 2023, WHAT WAS THAT BASED ON, PRODUCED
19 CONVERSATIONS?

20 A. I SAID THERE WAS NO DATE ON
21 THAT TRAINING, SO I DON'T HAVE A DATED
22 COPY OF THAT POWERPOINT THAT SHOWS IT WAS
23 PRESENTED AT A CERTAIN DATE AND TIME BUT
24 WE DO HAVE EVIDENCE THAT THAT WAS A
25 TRAINING THAT WAS PUT IN PLACE.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 230

1 Q. OKAY. WHAT I WANT TO KNOW IS
2 NOT WHETHER YOU THINK COMMUNICATE WITH
3 CARE TRAINING IS CONTINUED.

4 HAVE YOU SEEN ANY ACTUAL
5 COMMUNICATION OR TRAINING THAT WAS GIVEN
6 TO ALL EMPLOYEES OR A LARGE GROUP OF
7 EMPLOYEES THAT SPECIFICALLY SUGGESTED, IN
8 YOUR MIND, FOLKS, KEEP STUFF OFF THE
9 RECORD TO NOT CREATE ANTITRUST EVIDENCE?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. OTHER THAN WHAT I HAVE CITED
13 HERE, AT THIS POINT IN TIME I CAN'T THINK
14 OF SOMETHING POST 2015 THAT WAS TO ALL
15 GOOGLE EMPLOYEES.

16 Q. BUT YOU SAID "OTHER THAN WHAT
17 I'VE CITED HERE." YOU'VE ACTUALLY NOT
18 CITED HERE TO ANYTHING POST 2015, HAVE
19 YOU?

20 A. THAT'S RIGHT.

21 Q. SO I'M GOING TO -- LET ME ASK
22 YOU THIS, IS IT YOUR OPINION THAT IF AN
23 IMPROPER SUGGESTION LIKE THE ONE YOU
24 BELIEVE WAS MADE IN 2007 OR 2008, IF THAT
25 HAPPENED OVER A DECADE AGO, THEN FOREVER

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 231

1 THE COURT SHOULD ASSUME THE COMPANY HAS A
2 MOTIVE OF DESTROYING EVIDENCE?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. NO. THAT IS JUST ONE EMAIL
6 AMONGST MANY DIFFERENT PIECES OF -- MANY
7 DIFFERENT DOCUMENTS AND PIECES OF
8 EVIDENCE THAT DO SHOW THIS WAS AN ONGOING
9 POLICY WITHIN GOOGLE AND CULTURE THAT
10 ALLOWED FOR VERY LARGE NUMBERS OF GOOGLE
11 CHATS TO NOT BE PRESERVED IN THIS CASE.

12 Q. WELL, OKAY. THEN I WILL TWEAK
13 MY QUESTION A LITTLE BIT.

14 IF THE COURT SEES EVIDENCE
15 THAT IN THE 2007 TO 2015 TIME PERIOD
16 THERE REALLY WAS A CULTURE THAT YOU HAVE
17 DESCRIBED OF KEEPING THINGS OFF THE
18 RECORD, TO NOT CREATE ANTITRUST EVIDENCE,
19 IS THE COMPANY STUCK WITH THAT FOREVER,
20 THAT INTENT?

21 MR. RENARD: OBJECTION TO
22 FORM.

23 A. COULD YOU REPHRASE THAT? I'M
24 NOT SURE WHAT YOU'RE ASKING.

25 Q. SURE. YOU HAVE OFFERED AN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 232

1 OPINION THAT GOOGLE HAD AN ONGOING POLICY
2 AND CULTURE FOR CHATS NOT TO BE
3 PRESERVED; IS THAT RIGHT?

4 A. YES.

5 Q. AND NOT JUST ANY CHATS. YOUR
6 OPINION IS THAT THE GOAL WAS TO NOT PUT
7 STUFF IN WRITING THAT MAY BE RESPONSIVE
8 TO ANTITRUST DISCUSSIONS, RIGHT?

9 A. I THINK IT WAS A COMBINATION
10 OF VARIOUS FACTORS. THAT WAS ONE OF THEM.

11 Q. SO MY POINT, MY QUESTION IS,
12 IF ALL THE EVIDENCE YOU SEE IS FROM TIME
13 PERIOD A -- WE'RE GOING TO CALL IT TIME
14 PERIOD A -- FOR HOW LONG IN YOUR OPINION
15 SHOULD A COURT BE ABLE TO SAY, WELL, THAT
16 IS, IN FACT, WHAT THE COMPANY WAS
17 THINKING? IS IT 20 YEARS, IS IT 30 YEARS,
18 OR IS THERE NO SCIENCE TO THAT?

19 MR. RENARD: OBJECTION TO
20 FORM.

21 A. THERE'S EVIDENCE THROUGHOUT
22 THE ENTIRE TIME PERIOD UP UNTIL 2023 THAT
23 GOOGLE'S POLICIES WERE SET UP IN A WAY TO
24 ENCOURAGE THE "HISTORY OFF" BEING THE
25 DEFAULT SETTING. MANY EMPLOYEES STATED IN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 233

1 THEIR DEPOSITION TRANSCRIPTS THAT THEY
2 WOULD NOT CHANGE THE DEFAULT SETTINGS. SO
3 IF IT WAS "HISTORY OFF", THAT WOULD MEAN
4 EVEN IF THEY WERE TALKING ABOUT SOMETHING
5 POTENTIALLY RESPONSIVE TO A LITIGATION
6 HOLD THEY WOULD NOT TURN "HISTORY ON".
7 AND, YOU KNOW, AS I'VE MENTIONED IN
8 RESPONSE TO AN EARLIER QUESTION, THERE
9 ALSO WAS CONFUSION, AS I NOTE ON PAGE 42
10 OF MY REPORT, THAT WHEN HISTORY WAS ON OR
11 OFF AND THAT WAS NOT FIXED OR ADDRESSED
12 BY GOOGLE, I THINK WHAT IS A BIGGER ISSUE
13 HERE IS GOOGLE CREATES THESE -- CREATES
14 THE GOOGLE CHAT PLATFORM, THIS IS NOT
15 SOMETHING THAT THEY'RE USING THAT IS A
16 PLATFORM IS DIFFICULT TO OPERATE THAT
17 SOMEONE ELSE -- THAT THEY PURCHASED FROM
18 SOMEONE ELSE. THEY HAVE THE ABILITY TO
19 SET THIS UP IN A WAY THAT WILL RETAIN
20 INFORMATION AND IT WAS NOT SET UP IN A
21 WAY TO ALLOW FOR RETENTION OF POTENTIALLY
22 RESPONSIVE CHAT MESSAGES.

23 MS. NAJAM: I'LL OBJECT AS
24 NONRESPONSIVE.

25 Q. DO YOU REMEMBER WHAT MY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 234

1 QUESTION WAS OR DO WE NEED TO GO FIND IT?

2 A. YOU CAN REASK.

3 (GRANDE EXHIBIT 12, COPY OF
4 GOOGLE CHAT RETENTION POLICY, DATED
5 AS OF NOVEMBER 2020, WAS RECEIVED
6 AND MARKED ON THIS DATE FOR
7 IDENTIFICATION.)

8 Q. ACTUALLY, LET'S MOVE ON.

9 SORRY, I JUST HANDED YOU WHAT
10 I MARKED AS EXHIBIT 12. THIS IS THE
11 GOOGLE CHAT RETENTION POLICY THAT YOU --
12 THIS IS A GOOGLE CHAT RETENTION POLICY
13 THAT YOU CITED IN YOUR REPORT. ARE YOU
14 FAMILIAR WITH THIS?

15 A. YES.

16 Q. THIS DOESN'T SAY THAT OUR
17 POLICY IS AIMED TOWARDS CREATING -- SORRY
18 -- PREVENTING THE CREATION OF EVIDENCE,
19 DOES IT?

20 MR. RENARD: OBJECTION TO
21 FORM.

22 A. NO, IT DOESN'T STATE THAT.

23 Q. FOR THE RECORD, THIS POLICY
24 WAS LAST MODIFIED IN NOVEMBER OF 2020. DO
25 YOU SEE THAT AT THE TOP?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 235

1 A. YES. POLICY LAST MODIFIED
2 NOVEMBER 2020, PAGE LAST MODIFIED
3 FEBRUARY 25TH, 2020.

4 Q. GREAT. AND UNDERNEATH THAT IT
5 SAYS, "OUR GOOGLE CHAT RETENTION POLICY
6 AIMS TO REDUCE REDUNDANT, OBSOLETE AND
7 TRIVIAL INFORMATION IN CORPORATE CHATS BY
8 HELPING US ALL FOCUS ON OUR MOST
9 MEANINGFUL AND USEFUL MESSAGES, WE CAN
10 REDUCE TIME SPENT SIFTING THROUGH
11 IRRELEVANT, OLD MESSAGES AND REDUCE
12 STORAGE COSTS." DID I READ THAT RIGHT?

13 A. YES. THAT'S WHAT THAT SAYS.

14 Q. AND SIR, LET ME ASK YOU THIS,
15 RULE 37(E)(2), THAT'S THE ONE THAT ALLOWS
16 A COURT TO DRAW AN ADVERSE INFERENCE OR
17 TO INSTRUCT A JURY TO POTENTIALLY DRAW
18 ONE; IS THAT RIGHT?

19 MR. RENARD: OBJECTION, FORM.

20 Q. DO YOU WANT TO GO BACK TO --

21 A. I BELIEVE THAT'S THE CASE.

22 Q. GOOD. BECAUSE I DON'T KNOW
23 WHAT NUMBER I AFFORDED THE RULE IN TERMS
24 OF EXHIBITS.

25 A. 8.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 236

1 Q. THANK YOU. AND FOR THAT PART
2 OF THE RULE THAT IS NUMBER (2), THAT
3 REQUIRES THAT THE PARTY ACTED WITH THE
4 INTENT TO DEPRIVE ANOTHER PARTY OF THE
5 INFORMATION'S USE, RIGHT?

6 A. THAT'S CORRECT.

7 Q. AND MORE SPECIFICALLY, TO
8 DEPRIVE ANOTHER PARTY OF THE
9 INFORMATION'S USE IN THE LITIGATION?

10 A. THAT'S WHAT (2) SAYS, CORRECT.

11 Q. AND IN THE LITIGATION, SO
12 HERE, FOR EXAMPLE, THAT WOULD MEAN THE
13 STATE'S LAWSUIT AGAINST GOOGLE, RIGHT?

14 MR. RENARD: OBJECTION, FORM.

15 A. THAT WOULD BE MY
16 INTERPRETATION.

17 Q. THAT IS THE LITIGATION IN
18 WHICH THE SANCTIONS ARE BEING SOUGHT,
19 RIGHT?

20 A. I BELIEVE SO.

21 Q. CAN WE AGREE THAT THE DUTY TO
22 PRESERVE -- SORRY -- THAT RULE 37(E),
23 THAT IT DOES NOT APPLY WHEN THE
24 INFORMATION IS LOST BEFORE THE DUTY TO
25 PRESERVE ARISES?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 237

1 MR. RENARD: OBJECTION, FORM.

2 A. ARE YOU SAYING IT STATES THAT
3 SOMEWHERE OR --

4 Q. I'M ASKING IF YOU AGREE WITH
5 THAT PROPOSITION, THAT AS A PART OF YOUR
6 EDISCOVERY WORK IN ADVISING CLIENTS ON
7 WHEN TO KEEP AND HOW TO KEEP IT, YOU'RE
8 AWARE THAT THERE IS NO DUTY TO PRESERVE,
9 THAT IS IT DOESN'T APPLY WHEN THE
10 INFORMATION IS LOST BEFORE THAT DUTY EVEN
11 ARISES?

12 A. THAT'S FAIR.

13 Q. I WANT TO TALK A LITTLE BIT
14 MORE ABOUT SOME SEDONA CONFERENCE
15 MATERIALS. SO I'M GOING TO MARK ONE AND
16 HAND IT TO YOU.

17 (GRANDE EXHIBIT 13, SEDONA
18 CONFERENCE, INDUSTRY STANDARDS,
19 VOLUME 22 IN RE: EPHEMERAL
20 MESSAGING WAS RECEIVED AND MARKED
21 ON THIS DATE FOR IDENTIFICATION.)

22 Q. SO I'VE HANDED YOU EXHIBIT 13.
23 I'M GOING TO WAIT FOR THE SIRENS.

24 MR. RENARD: IN NEW YORK THAT
25 MAY BE AN ETERNITY.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 238

1 Q. SIR, THIS IS ONE OF THE
2 INDUSTRY STANDARDS THAT YOU HAVE RELIED
3 ON IN FORMING YOUR OPINIONS IN THIS CASE,
4 RIGHT?

5 A. YES.

6 Q. AND I TAKE IT YOU ARE FAMILIAR
7 WITH EXHIBIT 13, WHICH IS VOLUME 22? IT'S
8 THEIR COMMENTARY ON EPHEMERAL MESSAGING.

9 A. YES.

10 Q. AND THIS WAS ISSUED IN 2021,
11 RIGHT, SIR?

12 A. THAT'S CORRECT.

13 Q. AND SITTING HERE TODAY, IS
14 THERE ANY OBSERVATIONS OR GUIDANCE IN
15 THIS PARTICULAR VOLUME THAT YOU KNOW YOU
16 DISAGREE WITH?

17 A. I DON'T RECALL DISAGREEING
18 WITH A SPECIFIC STATEMENT. ALTHOUGH, THIS
19 IS NOW THREE YEARS OUT OF DATE BUT THREE
20 YEARS HAVE PASSED.

21 Q. ARE YOU AWARE OF ANYTHING THAT
22 THIS PARTICULAR VOLUME TOUCHES ON WHERE
23 YOU BELIEVE THINGS HAVE SIGNIFICANTLY
24 CHANGED IN THE LAW OR IN THE TECH IN THE
25 LAST THREE YEARS?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 239

1 A. I HAVEN'T REVIEWED IT FOR THAT
2 PURPOSE. I CAN IF YOU LIKE.

3 Q. NO. AM I RIGHT THAT YOU
4 CONSULTED THIS IN WRITING YOUR REPORT?

5 A. I DID.

6 Q. AND DID YOU REVIEW IT IN
7 PREPARATION FOR YOUR DEPOSITION TODAY?

8 A. I'VE REVIEWED IT AT SOME
9 POINT, YES.

10 Q. AND BEFORE WE GET INTO THIS, I
11 FORGOT TO ASK YOU THIS EARLIER, CAN WE
12 AGREE THAT REASONABLE MINDS, EVEN
13 EXPERTS, CAN DISAGREE ABOUT THE
14 APPROPRIATE LEVEL OF PRESERVATION
15 REQUIRED IN A PARTICULAR CIRCUMSTANCE?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 A. I BELIEVE THAT REASONABLE
19 MINDS CAN DISAGREE ON PRESERVATION IN
20 DIFFERENT SITUATIONS. I DON'T THINK
21 REASONABLE MINDS CAN DISAGREE ON THE
22 PRESERVATION REQUIRED IN THIS CASE.

23 Q. OKAY. NOTED. AND BY THE WAY,
24 THE WHOLE REASON THAT THE SEDONA
25 CONFERENCE ISSUED EXHIBIT 13 IS BECAUSE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 240

1 THEY PERCEIVED A NEED FOR COURTS AND
2 REGULATORS FOR SOME GUIDANCE ON EPHEMERAL
3 MESSAGING IN PARTICULAR, RIGHT?

4 A. I DON'T RECALL THE REASON FOR
5 ISSUING THE GUIDANCE BUT THERE WAS --
6 THERE WERE ALREADY RELEASES BY THE
7 DEPARTMENT OF JUSTICE AND OTHER
8 REGULATORS REGARDING EPHEMERAL MESSAGING
9 AT THE TIME THIS WAS ISSUED.

10 Q. NOTWITHSTANDING THE FACT THAT
11 THERE HAD BEEN RELEASES, DO YOU REMEMBER
12 THAT THE SEDONA CONFERENCE PUT THIS OUT
13 BECAUSE -- WELL, YOU KNOW WHAT, WE'LL
14 JUST LOOK AT WHAT THEY SAID.

15 A. YES.

16 Q. SO LET'S LOOK AT THE
17 INTRODUCTION SECTION STARTING WITH PAGE
18 443. IT MIGHT BE HELPFUL TO GO BACK TO
19 441, THE BEGINNING OF THE INTRODUCTION.
20 ARE YOU THERE?

21 A. YES.

22 Q. OKAY. AND I'M NOT GOING TO
23 READ WORD FOR WORD. I JUST WANT TO MAKE
24 SURE YOU'RE FOLLOWING WITH ME.

25 IN THE FIRST PARAGRAPH SEDONA

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 241

1 COMMENTS ABOUT EPHEMERAL MESSAGING
2 OFFERING ORGANIZATION CERTAIN BENEFITS.
3 DO YOU SEE THAT? ORGANIZATIONS.

4 A. I'M SORRY. WHERE ARE YOU?
5 MR. RENARD: SHE WAS TALKING
6 ABOUT THE VERY --

7 Q. I WAS TALKING ABOUT THE
8 VERY FIRST PAGE, INTRODUCTIONS.

9 A. YES.

10 Q. AND THEN IN THE THIRD
11 PARAGRAPH IT SAYS, "DESPITE THE GROWING
12 USE OF EPHEMERAL MESSAGING THERE ARE
13 CONCERNS ABOUT ITS WIDESPREAD ADOPTION."
14 AND THEN IT REFERENCE REGULATORS AT DOJ
15 AND THE SEC. DO YOU SEE THAT?

16 A. I DO.

17 Q. THEN I WANT TO JUMP TO PAGE
18 443. IN THE SECOND FULL PARAGRAPH IT
19 STARTS "THIS TENSION". ARE YOU WITH ME?

20 A. YES.

21 Q. "THIS TENSION IS ALSO APPARENT
22 FOR GOVERNMENT REGULATORS AND JUDGES WHO
23 HAVE BEEN TASKED WITH EVALUATING AN
24 ORGANIZATION'S EFFORTS AT COMPLIANCE WITH
25 A PARTICULAR LAW OR REGULATION. THESE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 242

1 DECISIONMAKERS MAY BE INCLINED TO PRESUME
2 THAT EPHEMERAL MESSAGING IS BEING USED TO
3 PREVENT REGULATORS, COURTS, LITIGATION
4 ADVERSARIES OR THE PUBLIC FROM OBTAINING
5 CRITICAL INFORMATION ABOUT THE INSIDE
6 WORKINGS OF AN ORGANIZATION." DID I READ
7 THAT CORRECTLY?

8 A. YES.

9 Q. AND THEN SEDONA WRITES, "A
10 CLOSER MORE THOROUGH INSPECTION MAY
11 PROVIDE A MORE BALANCED PERSPECTIVE
12 REVEALING A CORPORATE EPHEMERAL MESSAGING
13 PROGRAM IS MERITORIOUS AND DESIGNED TO
14 ADVANCE BUSINESS OBJECTIVES, INCLUDING
15 COMPLIANCE WITH CROSS-BORDER DATA
16 PROTECTION REGIMES." DID I READ THAT
17 CORRECTLY?

18 A. YES.

19 Q. AND THOSE ARE SOME OF THE
20 REASONS THAT LED THE SEDONA CONFERENCE TO
21 ISSUE THIS VOLUME, RIGHT?

22 A. AMONGST OTHER REASONS.

23 Q. WELL, IT SAYS ON THE NEXT
24 PAGE, FIRST FULL PARAGRAPH, "ALL OF WHICH
25 HAS LED THE SEDONA CONFERENCE TO PREPARE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 243

1 THIS DOCUMENT." RIGHT, SIR?

2 A. AND THERE ALSO INCLUDES THE
3 LAST OR THE FIRST PARAGRAPH ON PAGE 443
4 THAT STATES THAT, "ONCE THE COMMON LAW
5 DUTY TO PRESERVE ATTACHES, USE OF
6 EPHEMERAL MESSAGING MAY CAUSE RELEVANT
7 DATA TO BE DISCARDED WHICH CAN VIOLATE
8 THAT DUTY."

9 MS. NAJAM: OKAY. I'LL OBJECT
10 AS NONRESPONSIVE AND WE CAN MOVE
11 ON.

12 Q. 445, "THESE GUIDELINES ARE
13 DESIGNED TO HELP ORGANIZATIONS AND THEIR
14 COUNSEL IN ADDITION TO REGULATORS AND
15 COURTS AS THEY EVALUATE AND ADDRESS
16 CONFLICTING OBLIGATIONS FOR ORGANIZATIONS
17 REGARDING THEIR USE OF EPHEMERAL
18 MESSAGING." DID I READ THAT CORRECTLY?

19 A. YES.

20 Q. SO THE POINT OF THIS WAS TO
21 RECONCILE THE TENSIONS BETWEEN CONCERNS
22 ABOUT LOSING DATA, USING EPHEMERAL
23 MESSAGING VERSUS THE BENEFITS OF
24 EPHEMERAL MESSAGING; IS THAT AN ACCURATE
25 RECAP?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 244

1 MR. RENARD: OBJECTION TO
2 FORM.

3 A. AGAIN, AS FAR AS THE -- I
4 COULDN'T OPINE AS TO THE PURPOSE. I
5 BELIEVE THIS IS A COMMENTARY ON EPHEMERAL
6 MESSAGING. THAT'S THE WAY I READ IT.

7 Q. YOU HAVE NO IDEA WHY THIS WAS
8 ISSUED, EVEN THOUGH WE JUST READ THE
9 INTRODUCTION?

10 A. FOR A NUMBER OF THE REASONS IN
11 THAT INTRODUCTION, WHICH INCLUDE THE ONE
12 I MENTION, AMONGST OTHERS.

13 Q. ALL RIGHT. LET'S GET A
14 CLARIFICATION STRAIGHT IN TERMS OF THE
15 PHRASE EPHEMERAL MESSAGING.

16 ARE YOU AWARE IN THIS DOCUMENT
17 SEDONA ACTUALLY WENT THROUGH AND
18 DISTINGUISHED BETWEEN PURELY EPHEMERAL
19 VERSUS QUASI-EPHEMERAL?

20 A. AND NON-EPHEMERAL.

21 Q. DID YOU SAY NON-EPHEMERAL?

22 A. YES.

23 Q. CAN WE AGREE THAT SEDONA HAS
24 DESCRIBED IT IN THIS DOCUMENT THAT
25 GOOGLE'S CHAT SYSTEM WAS EMPLOYED -- WAS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 245

1 A QUASI-EPHEMERAL MESSAGING SYSTEM? LET
2 ME KNOW IF YOU NEED HELP.

3 A. JUST GIVE ME A SECOND TO
4 REVIEW THAT.

5 (DEPONENT REVIEWS THE
6 DOCUMENT.)

7 Q. I'M GOING TO RETRACT MY
8 QUESTION IN THE INTEREST OF TIME. LET'S
9 PLEASE GO TO PAGE 451. ARE YOU THERE?

10 A. I AM.

11 Q. IT'S CALLED -- SORRY -- TWO IS
12 CALLED QUASI-EPHEMERAL MESSAGING. DO YOU
13 SEE THAT?

14 A. THAT'S WHAT I WAS READING.

15 Q. AND ONE EXAMPLE OF A FEATURE
16 THAT CHARACTERIZES QUASI-EPHEMERAL
17 MESSAGING IS THAT PRESERVATION IS
18 POSSIBLE IN CERTAIN CIRCUMSTANCES, RIGHT,
19 SIR, ALSO THE FIRST BULLET?

20 A. YES.

21 Q. AND GOOGLE'S CHAT SYSTEM AND
22 GOOGLE'S CHAT SYSTEM PRESERVATION WAS
23 POSSIBLE AS LONG AS HISTORY WAS ON,
24 CORRECT?

25 A. THAT'S CORRECT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 246

1 Q. BUT THERE WAS ALSO A
2 POSSIBILITY IF HISTORY WAS OFF FOR THE
3 MESSAGE TO BE NOT SUBJECT TO BEING SAVED
4 AT ALL, CORRECT?

5 A. THAT'S CORRECT.

6 Q. IN THAT INSTANCE YOU WOULD
7 CONSIDER THAT, UNDER THE WAY SEDONA PUTS
8 IT, THAT WOULD BE AN EPHEMERAL MESSAGE,
9 AN OFF THE RECORD, PURELY EPHEMERAL
10 MESSAGE?

11 A. IF IT -- IF -- SAY THAT AGAIN?
12 CAN YOU REPEAT THAT?

13 Q. IF A MESSAGE IN GOOGLE'S
14 SYSTEM WAS SENT WITH A "HISTORY OFF",
15 THEN IN SEDONA'S WORDS THAT MESSAGE WOULD
16 BE PURELY EPHEMERAL?

17 A. YES, THAT'S FAIR.

18 Q. PURELY EPHEMERAL AS USED ON
19 PAGE 449.

20 A. RIGHT.

21 Q. LET'S MOVE ALONG.

22 A. BUT I WOULD SAY -- I'M SORRY
23 -- BECAUSE AS FAR AS WHETHER THE WHOLE
24 SYSTEM IS QUASI-EPHEMERAL, ONE OF THE
25 REQUIREMENTS IS QUASI-EPHEMERAL MESSAGES

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 247

1 THAT THE METADATA, INCLUDING THE TIME A
2 MESSAGE WAS SENT OR RECEIVED OR THE
3 IDENTITY OF THE SENDER OR RECIPIENTS IS
4 RETAINED, MY UNDERSTANDING FROM THE LOGS
5 THAT WE PREVIOUSLY TALKED ABOUT, THAT
6 THAT IS NOT -- THAT THOSE LOGS ARE NOT
7 MAINTAINED.

8 Q. LOOKING AT THIS PAGE AGAIN, IT
9 ACTUALLY DOESN'T SAY THAT THE FOLLOWING
10 ARE REQUIRED ELEMENTS TO CALL IT
11 QUASI-EPHEMERAL, DOES IT?

12 A. IT SAYS, "THE FOLLOWING
13 MESSAGE MAY CHARACTERIZE QUASI-EPHEMERAL
14 MESSAGING APPLICATIONS." I DON'T THINK
15 THIS IS INTENDED TO BE A DEFINITION
16 THAT -- YOU KNOW, THESE ARE ROUGH
17 CATEGORIES.

18 Q. OKAY. SO JUST TO MAKE SURE WE
19 DIDN'T LOSE ANY GROUND THERE, CAN WE
20 AGREE THAT THE WAY GOOGLE'S CHAT SYSTEM
21 WAS SET UP, IT FITS IN BULLET 1 HERE
22 UNDER QUASI-EPHEMERAL, IN THAT
23 PRESERVATION WAS POSSIBLE UNDER CERTAIN
24 CIRCUMSTANCES?

25 A. I WOULD SAY GOOGLE'S CHAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 248

1 SYSTEM REALLY IS PROBABLY A COMBINATION
2 OF ONE, TWO AND THREE, UNDER THESE
3 FACTORS.

4 Q. OKAY.

5 A. IT DEPEND ON HOW YOU
6 CHARACTERIZED IT AND HOW IT WAS SET UP.

7 Q. OKAY. WE'RE GOING TO MOVE ON.
8 LET'S LOOK AT PAGE 454.

9 A. YES, I'M THERE.

10 Q. OKAY. SO UNDER THE CATEGORY
11 TENSIONS ASSOCIATED WITH THE USE OF
12 EPHEMERAL MESSAGING APPLICATIONS, IN PART
13 A, SEDONA WENT THROUGH AND OUTLINED SOME
14 BENEFITS OF EPHEMERAL MESSAGING. DO YOU
15 SEE THAT?

16 A. YES.

17 Q. AND UNDER TITLE -- SORRY,
18 SUBHEADING 1, ORGANIZATIONAL BENEFITS, IT
19 NOTES FOR ORGANIZATIONS THAT IT "SUPPORTS
20 INFORMATION GOVERNANCE BEST PRACTICES BY
21 REDUCING UNNECESSARY DATA. IT ALSO
22 FACILITATES, AMONG OTHER THINGS,
23 COMPLIANCE WITH LEGAL REQUIREMENTS TO
24 PROTECT PERSONAL DATA, PRIVACY BY DESIGN
25 AND DATA SECURITY OBJECTIVES." DID I READ

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 249

1 THAT CORRECTLY?

2 A. YOU DID.

3 Q. AND BEFORE I GO -- ACTUALLY,
4 LET'S KEEP READING. UNDER INFORMATION
5 GOVERNANCE, IS THAT IG IN EDISCOVERY
6 CIRCLES?

7 A. THAT'S CORRECT.

8 Q. BECAUSE IN OTHER CIRCLES IT
9 MEANS SOMETHING DIFFERENT.

10 IT SAYS, "THE MASSIVE GROWTH
11 IN DATA VOLUMES HAS DRIVEN ORGANIZATIONS
12 TO ADOPT POLICIES THAT SEEK TO MANAGE THE
13 LIFECYCLE OF DATA. THE FOCUS OF THOSE
14 POLICIES IS ON RETENTION OF DATA WITH
15 ONGOING BUSINESS VALUE, AND EARLY
16 IDENTIFICATION AND ACTION TO DISCARD DATA
17 WITHOUT SUCH VALUE, RESPONSIBLE USAGE OF
18 EPHEMERAL MESSAGING TOOLS CAN OFFER
19 SIGNIFICANT ECONOMIES IN DATA STORAGE AND
20 RECORDS MANAGEMENT."

21 SO I WANT TO PAUSE THERE. WE
22 WILL READ A FEW OTHER PARTS OF THIS, MR.
23 GRANDE, BUT CAN WE AGREE THAT SEDONA
24 RECOGNIZES THAT BUSINESSES DO FOCUS ON A
25 DISTINCTION BETWEEN DATA THAT HAS ONGOING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 250

1 BUSINESS VALUE AND DATA THAT DOESN'T?

2 MR. RENARD: OBJECTION TO
3 FORM.

4 A. YES, BUT THIS IS BASED ON --
5 NOT BASED ON THE TYPE OF COMMUNICATION,
6 IT'S BASED ON WHETHER A DOCUMENT HAS
7 ONGOING BUSINESS VALUE OR NOT.

8 MS. NAJAM: OKAY. I'LL OBJECT
9 TO EVERYTHING AFTER "YES" AS
10 NONRESPONSIVE.

11 Q. SEDONA IS NOT CRITICIZING THE
12 POLICIES OF ORGANIZATIONS BEING FOCUSED
13 ON RETENTION OF DATA WITH ONGOING
14 BUSINESS VALUE AND EARLY IDENTIFICATION
15 AND ACTION TO GET RID OF DATA WITHOUT IT,
16 TRUE?

17 MR. RENARD: OBJECTION, FORM.

18 A. THAT'S WHAT THAT PROVISION
19 STATES.

20 Q. MY QUESTION WAS, ARE WE GOING
21 TO FIND THAT SEDONA CRITICIZES THAT
22 DISTINCTION THAT ORGANIZATIONS ARE
23 MAKING?

24 A. NO. BUT, AGAIN, I DON'T THINK
25 THAT'S THE SAME DISTINCTION BEING MADE BY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 251

1 GOOGLE IN THIS CASE .

2 Q. TOTALLY GET IT. AND I'LL
3 OBJECT TO EVERYTHING AFTER "NO" AS
4 NONRESPONSIVE. LET'S GO TO THE NEXT PAGE
5 455 .

6 AT THE BOTTOM OF 455 THERE IS
7 A SENTENCE THAT GOES ONTO THE NEXT PAGE .
8 IT SAYS "LIKEWISE" -- I'M GOING TO
9 ABBREVIATE IT -- "IG POLICIES THAT
10 PRIORITIZE DATA ASSETS WITH BUSINESS
11 VALUE RATHER THAN CONTROLLING ALL
12 INFORMATION EQUALLY ENHANCE THE
13 USEFULNESS OF RETAINED INFORMATION AND
14 ARE MORE RESPONSIVE TO CHANGING END USER
15 PREFERENCES." DID I READ THAT CORRECTLY?

16 A. SORRY, I WAS LOOKING AT THE
17 WRONG SPOT. YES, THAT'S WHAT IT SAYS .

18 Q. AND BY THE WAY, IN ANY -- IN
19 THIS PAPER ARE WE GOING TO FIND SEDONA
20 INSTRUCTING FOLKS THAT, HEY, WHEN YOU
21 MAKE THAT DISTINCTION YOU CAN'T MAKE IT
22 ON THE KIND OF COMMUNICATION, IT HAS TO
23 BE ON THE SUBSTANCE?

24 MR. RENARD: OBJECTION TO
25 FORM .

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 252

1 A. YEAH, WELL, IF YOU COULD
2 REPHRASE THAT? I'M NOT SURE WHAT YOU'RE
3 ASKING.

4 Q. ANYWHERE IN THIS PAPER ON
5 EPHEMERAL MESSAGING FROM SEDONA WILL WE
6 FIND AN INSTRUCTION TO COMPANIES SAYING,
7 WHEN YOU MAKE THAT DISTINCTION BETWEEN
8 DATA WITH ONGOING BUSINESS VALUE VERSUS
9 NOT, YOU CAN'T MAKE IT BASED ON THE KIND
10 OF COMMUNICATION, IT HAS TO BE ON WHAT'S
11 IN IT?

12 A. I BELIEVE THAT'S WHAT THAT
13 PARAGRAPH STATES. IT SAYS, "EPHEMERAL
14 MESSAGING CAN ASSIST WITH IMPLEMENTATION
15 OF THE LIFECYCLE PROCESS BY LIMITING DATA
16 WITH NO ONGOING BUSINESS VALUE." AND
17 THEN IT HAS IN PARENTHESIS, "EXAMPLE,
18 ROUTINE COMMUNICATIONS, MEETING REQUESTS,
19 DUPLICATIVE EMAIL CHAINS TO LARGE
20 GROUPS." IT'S NOT STATING ALL CHATS. IT'S
21 SAYING CERTAIN KINDS OF COMMUNICATIONS OR
22 DOCUMENTS THAT ARE NOT SUBSTANTIVE.

23 Q. OKAY. WE CAN MOVE ON. I
24 UNDERSTAND WHAT YOU'RE SAYING.

25 A. AND I WOULD NOTE BEING I DID

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 253

1 CITE THIS -- THE AREA I WOULD ADDRESS IS
2 THE LEGAL RISK ON PAGE 468, WHICH IS WHAT
3 WAS CITED IN MY REPORT.

4 Q. ARE YOU SAYING YOU'RE ONLY
5 FAMILIAR WITH PAGES THAT YOU CITED IN THE
6 REPORT?

7 A. NO, BUT I BELIEVE THAT --

8 Q. YOU WANT ME TO READ 468?

9 A. NO, I THINK LEGAL RISK APPLIES
10 TO EVERYTHING WE'VE READ BECAUSE IF THERE
11 IS A LITIGATION HOLD IN PLACE, THE
12 STATEMENTS THAT YOU'VE TALKED ABOUT NO
13 LONGER APPLY IN THE SAME MANNER.

14 MS. NAJAM: I'LL OBJECT AS
15 NONRESPONSIVE.

16 Q. I UNDERSTAND YOUR OPINIONS. I
17 READ THEM IN YOUR REPORT. MY QUESTIONS
18 ARE GOING TO BE ON OTHER STUFF.

19 A. THAT'S FINE.

20 Q. WE'RE GOING TO GO TO THE
21 GUIDELINES THAT SEDONA PUT OUT BEGINNING
22 ON PAGE 471.

23 A. THE SAME DOCUMENT?

24 Q. YES. THE FIRST GUIDELINE IS,
25 "REGULATORS AND COURTS SHOULD RECOGNIZE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 254

1 THAT EPHEMERAL MESSAGING MAY ADVANCE KEY
2 BUSINESS OBJECTIVES. " RIGHT?

3 A. YES.

4 Q. AND SOME OF THE KEY BUSINESS
5 OBJECTIVES WE'VE ALREADY ADDRESSED BUT
6 THEY'RE COVERED IN THIS PORTION,
7 INCLUDING DATA MINIMIZATION, RIGHT?

8 A. I BELIEVE THAT'S MENTIONED
9 HERE.

10 Q. SPECIFICALLY LIMITING THE
11 RETENTION OF CORPORATE DATA THAT HAS NO
12 ONGOING BUSINESS VALUE, RIGHT?

13 A. YES.

14 Q. AND IF YOU GO TO PAGE 472, THE
15 SECOND PARAGRAPH SEDONA GUIDELINE IS
16 SUGGESTING THAT COURTS CONSIDER -- MAY
17 CONSIDER THE BENEFITS SURROUNDING
18 EPHEMERAL MESSAGING IN CONNECTION WITH
19 FOUR PRINCIPAL AREAS OF IG;
20 RECORDKEEPING, DATA PRESERVATION,
21 REGULATORY SCRUTINY AND CROSS-BORDER DATA
22 TRANSFERS. AND THEN IT SAYS, "CONCERNS
23 OVER THE INTERPLAY OF EPHEMERAL MESSAGING
24 IN THESE FOUR AREAS CAN IMPACT A PARTY'S
25 LEGAL INTERESTS AS WELL AS ITS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 255

1 REPUTATION. THIS IS PARTICULARLY THE CASE
2 WHERE REGULATORS AND COURTS MAY BE
3 INCLINED TO PRESUME THAT EPHEMERAL
4 MESSAGING IS A MEANS TO CONCEAL IMPROPER
5 CONDUCT. "

6 CAN WE AGREE THAT SEDONA WANTS
7 TO CONVEY TO REGULATORS AND COURTS THAT
8 THEY SHOULD NOT AUTOMATICALLY SUSPECT
9 FOUL PLAY BY THE MERE USE OF EPHEMERAL
10 MESSAGING?

11 A. I CAN JUST SAY WHAT THAT
12 PARAGRAPH STATES THAT REGULATORS AND
13 COURTS MAY CONSIDER THE BENEFITS OF
14 EPHEMERAL MESSAGING.

15 Q. WELL, IF YOU KEEP READING,
16 SEDONA IS ALSO SUGGESTING THAT WHY
17 EPHEMERAL MESSAGING LIKE PHONE CALLS HAS
18 BEEN USED FOR IMPROPER PURPOSES, AND NOW
19 I'M QUOTING, "SUCH A PERCEPTION MAY BE
20 TEMPERED AS REGULATORS AND COURTS
21 CONSIDER THE BUSINESS PURPOSE SERVED BY
22 THIS TECHNOLOGY." DO YOU SEE WHERE I AM
23 NOW ON PAGE 473? IS THAT A YES?

24 A. YES, I SEE THAT.

25 Q. AND THEN, SIR, IT MENTIONS A

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 256

1 DOJ 2019 CHANGE IN TERMS OF ITS FCPA
2 CORPORATE ENFORCEMENT POLICY, WHERE THE
3 DOJ ABANDONED WHAT WAS UNTIL THEN AN
4 EXPRESS PROHIBITION AGAINST EPHEMERAL
5 MESSAGING BY ORGANIZATIONS SEEKING
6 COOPERATION CREDIT.

7 WERE YOU AWARE -- IS THAT
8 SOMETHING THAT YOU WERE AWARE OF?

9 A. YES.

10 Q. AND THAT CHANGE HAPPENED
11 BECAUSE THE DOJ REALIZED THAT THERE WAS
12 NO NEED TO AUTOMATICALLY ASSUME THAT THE
13 USE OF EPHEMERAL MESSAGING WAS BEING DONE
14 FOR WRONGDOING, TRUE?

15 A. IT'S A FAIR DESCRIPTION OF
16 THAT -- WHY THAT CHANGE HAPPENED AND
17 AGAIN THIS IS A CHANGE BACK IN 2019. YOU
18 KNOW, THERE'S STUFF THAT -- DOJ HAS MADE
19 RELEASES SINCE THIS WAS RELEASED.

20 Q. OKAY. I'LL OBJECT AS
21 NONRESPONSIVE. WE'RE GOING TO GO TO PAGE
22 479 NOW.

23 SO I WANT TO ORIENT YOU
24 BECAUSE NOW. I'M JUST TAKING YOU TO A
25 RANDOM PAGE. WE ARE IN A SECTION THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 257

1 STARTS ON PAGE 476 , IT'S CALLED GUIDELINE
2 3 .

3 A . GOT IT .

4 Q . "ORGANIZATIONS SHOULD MAKE
5 INFORMED CHOICES AND DEVELOP
6 COMPREHENSIVE USE POLICIES FOR EPHEMERAL
7 MESSAGING APPLICATIONS . "

8 SO JUMPING BACK TO 479 , WITHIN
9 THAT SECTION SEDONA SUGGESTS IN THAT
10 FIRST SENTENCE , FULL SENTENCE ON THAT
11 PAGE , "ORGANIZATIONS MAY ALTERNATIVELY
12 SELECT A MIDDLE GROUND ALLOWING EMPLOYEES
13 TO COMMUNICATE WITH EPHEMERAL MESSAGING
14 UNTIL A LEGAL HOLD OBLIGATION ARISES , AT
15 WHICH TIME USE OF THE APPLICATION BY KEY
16 CUSTODIANS OF RELEVANT INFORMATION MAY BE
17 DISABLED OR OTHERWISE PROHIBITED FOR ANY
18 COMMUNICATIONS RELATED TO THE SUBJECT
19 MATTER OF THE HOLD . " DID I READ THAT
20 CORRECTLY?

21 A . I THINK THAT'S PART OF THAT
22 PARAGRAPH , BUT THERE'S FURTHER DISCUSSION
23 EARLIER ON WITH REGARD TO LONGER
24 RETENTION PERIODS AND THE ABILITY TO
25 AFFECT -- OKAY .

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 258

1 Q. YOU'RE CORRECT. AND IF YOU
2 READ UP IN THAT SAME PARAGRAPH, THERE'S A
3 SHORT OPTION AND THERE IS A LONG OPTION,
4 AND WHAT I JUST READ TO YOU WAS MIDDLE
5 GROUND, RIGHT?

6 A. THAT'S CORRECT.

7 Q. SO I JUST WANT TO MAKE SURE
8 WE'RE READING SEDONA'S SUGGESTIONS THE
9 SAME WAY.

10 WHEN IT SAYS THAT "IT MAY BE
11 DISABLED OR OTHERWISE PROHIBITED FOR ANY
12 COMMUNICATIONS RELATING TO THE SUBJECT
13 MATTER OF THE HOLD", CAN WE AGREE THAT
14 SEDONA IS NOT SUGGESTING THAT PHYSICALLY
15 DISABLING EPHEMERAL MESSAGING IS BEST
16 PRACTICE -- I'M SORRY -- IS THE ONLY BEST
17 PRACTICE?

18 MR. RENARD: OBJECTION TO
19 FORM.

20 A. I WOULD AGREE THAT SEDONA SETS
21 FORTH DIFFERENT OPTIONS REGARDING
22 PRESERVATION, NOT JUST DISABLING.

23 Q. YOU CAN PUT EXHIBIT 13 ASIDE.
24 YOU MENTIONED A COUPLE OF TIMES TODAY
25 THAT IN YOUR OPINION EMPLOYEES MAY HAVE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 259

1 BEEN CONFUSED BY THE RETENTION SETTING.
2 DO YOU RECALL THAT?

3 A. I BELIEVE REGARDING THE
4 ABILITY TO TURN HISTORY ON OR OFF IS WHAT
5 I WAS REFERENCING.

6 Q. SO LET'S LOOK AT PAGE 42 OF
7 YOUR REPORT. THERE IS AN IMAGE THERE.
8 LET ME JUST MARK THAT AS A SEPARATE
9 EXHIBIT. IT WILL BE EXHIBIT 14.

10 (GRANDE EXHIBIT 14, IMAGE FROM
11 EXPERT REPORT, WAS RECEIVED AND
12 MARKED ON THIS DATE FOR
13 IDENTIFICATION.)

14 Q. IN EXHIBIT 14, THAT IS THE
15 EXACT SAME IMAGE THAT YOU EXCERPTED IN
16 YOUR REPORT, RIGHT, IT'S JUST BIGGER?

17 A. YES.

18 Q. ACTUALLY, I'M SORRY, IT'S THE
19 -- IT'S THE PICTURE, ITSELF, OF WHAT YOU
20 FOUND TO APPEAR CONFUSING, THAT IS THE
21 CLOCK WITH A SLASH IN IT?

22 A. YES. THIS IS AN ATTACHMENT TO
23 A LONGER CHAT/EMAIL CORRESPONDENCE.

24 Q. OKAY. I JUST WANT TO MAKE SURE
25 I UNDERSTAND. I UNDERSTAND THAT YOU HAVE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 260

1 QUOTED SOME PEOPLE'S DISCUSSIONS ABOUT
2 THE CLOCK WITH THE SLASH. YOU'RE NOT
3 OPINING THAT ANY PERSON AT GOOGLE
4 COULDN'T READ THE WORDS "HISTORY ON" THAT
5 ARE NEXT TO THE CLOCK WITH THE SLASH, ARE
6 YOU, SIR?

7 A. NO, BUT THE -- WHAT I AM
8 SUGGESTING IS THAT THE CLOCK WITH THE
9 SLASH IS ALL THAT WOULD APPEAR WHEN
10 SOMEONE WAS SENDING A CHAT TO SHOW THAT
11 HISTORY WAS ON OR OFF. YOU WOULDN'T
12 NECESSARILY HAVE THE LANGUAGE THERE.

13 Q. OKAY. I UNDERSTAND. BUT IF
14 ANYONE ACTUALLY HIT ANY KIND OF DROPDOWN
15 EVER THEY WOULD ACTUALLY RECEIVE THE TEXT
16 ALONG WITH THAT CLOCK WITH A SLASH,
17 RIGHT, THE TEXT THAT SAYS "HISTORY ON"?

18 A. I BELIEVE THEY HAVE TO CLICK
19 ON THE -- ON THAT ICON TO MAKE THAT
20 CHANGE TO SEE WHAT WAS "HISTORY ON" WHAT
21 WAS "HISTORY OFF".

22 Q. OKAY. HOW MANY EXAMPLES OF
23 THE MILLIONS OF INDIVIDUAL CHAT MESSAGES
24 OR EMAILS PRODUCED IN THIS CASE REFLECT
25 AN EMPLOYEE WAS CONFUSED BY THE PICTURE?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 261

1 A. THERE WERE NUMEROUS EMAILS
2 WHERE EMPLOYEES WERE CONFUSED. IT WASN'T
3 NECESSARILY ALWAYS BY THE PICTURE BUT IT
4 WAS BY WHETHER HISTORY WAS ON OR OFF OR
5 HOW TO TURN HISTORY ON OR OFF IN CHATS.

6 Q. WHEN YOU SAY "NUMEROUS",
7 THAT'S WHAT I'M ASKING.

8 OUT OF THE MILLIONS OF CHAT
9 MESSAGES AND EMAILS PRODUCED IN THIS
10 CASE, CAN YOU GIVE US A NUMBER OR A
11 PERCENTAGE?

12 A. I COULDN'T GIVE YOU AN EXACT
13 PERCENTAGE.

14 Q. DO YOU HAVE AN OPINION ON THE
15 PERCENTAGE OF GOOGLE EMPLOYEES THAT IN
16 2019 WERE UNDER SOME CONFUSION ABOUT
17 WHETHER THEIR RETENTION WAS REALLY OFF OR
18 NOT?

19 A. I THINK BASED UPON THE NUMBER
20 OF CHATS I'VE SEEN AND THE DIFFERENT WAYS
21 IN WHICH THE HISTORY ON/OFF INDICATOR
22 COULD HAVE LED TO CHATS NOT BEING
23 PRESERVED, I THINK IT COULD BE A VERY
24 LARGE NUMBER OF CHATS THAT WERE
25 INADVERTENTLY NOT SENT WITH "HISTORY ON".

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 262

1 AS I MENTIONED IN THE
2 REPORT, THERE ARE A NUMBER OF REASONS,
3 NOT JUST THIS ICON WHICH, YOU KNOW, IS
4 INCREDIBLY CONFUSING TO ME, BUT ALSO,
5 YOU KNOW, AGAIN, FOR SOME OF THE
6 REASONS MR. MALKIEWICZ STATED IN HIS
7 DEPOSITION AFTER 24 HOURS THE HISTORY,
8 IF YOU PUT "HISTORY ON" IT WOULD TURN
9 OFF AUTOMATICALLY. AND IN ADDITION,
10 WHAT SOMEONE ELSE IN A CONVERSATION
11 TURNED "HISTORY ON" -- EXCUSE ME --
12 TURNED "HISTORY OFF" AFTER SOMEONE HAD
13 TURNED -- AFTER THE OTHER INDIVIDUAL
14 HAD TURNED HISTORY -- IF SOMEONE ELSE
15 IN THE CONVERSATION TURNED "HISTORY
16 OFF" AFTER AN INDIVIDUAL HAD TURNED
17 "HISTORY ON", THAT CHAT WOULD NOT BE
18 PRESERVED. AGAIN, WHETHER IT'S A SWISS
19 CHEESE TYPE CONVERSATION OR THE FACT
20 THAT CONVERSATIONS WERE JUST NOT
21 PRESERVED, I THINK THERE ARE A NUMBER
22 OF REASONS WHY THIS WAS CONFUSING.

23 MS. NAJAM: SIR, OBJECT AS
24 NONRESPONSIVE.

25 Q. AND I'M TRYING TO BE PATIENT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 263

1 IF YOU DON'T HAVE AN OPINION YOU CAN SAY
2 I DON'T HAVE AN OPINION. I WILL REPEAT MY
3 QUESTION.

4 A. SURE.

5 Q. DO YOU HAVE AN OPINION ON THE
6 PERCENTAGE OF GOOGLE EMPLOYEES WHO IN
7 2019 WERE UNDER SOME CONFUSION ABOUT
8 WHETHER THEIR RETENTION WAS REALLY OFF OR
9 NOT?

10 A. I THINK IT'S A LARGE
11 PERCENTAGE. I DON'T HAVE AN EXACT AMOUNT
12 FOR YOU.

13 Q. CAN WE AGREE -- WELL, LET ME
14 ASK YOU THIS, DO YOU KNOW WHETHER THE
15 ICONS CHANGED OVER TIME, LIKE, WHICH
16 MEANT WHAT?

17 A. I WOULD BELIEVE THEY DID
18 CHANGE OVER TIME.

19 Q. SO FOR HOW LONG WERE THEY
20 CONFUSING, IN YOUR VIEW?

21 A. I DON'T KNOW.

22 Q. DO YOU EVEN -- DO YOU KNOW
23 TODAY WHETHER THE INDICATORS, LIKE IN
24 TODAY'S VERSION OF GOOGLE CHAT, WHAT THE
25 DISPLAY LOOKS LIKE IN TERMS OF THE CLOCK,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 264

1 THE ACCOMPANYING TEXT, ET CETERA?

2 A. I'VE SEEN TODAY'S VERSION OF
3 GOOGLE CHAT FOR CUSTOMERS. I DON'T KNOW
4 IF IT'S THE SAME VERSION OF GOOGLE CHAT
5 THAT'S BEING USED BY EMPLOYEES.

6 Q. WELL, THE GOOGLE CHAT VERSION
7 FOR CUSTOMERS, YOU KNOW THAT IT
8 SPECIFICALLY HAS "HISTORY OFF" OR
9 "HISTORY ON" IN THE BAR, RIGHT?

10 A. YES, THE CURRENT VERSION.

11 Q. AND DO YOU KNOW FOR A -- DO
12 YOU KNOW ONE WAY OR THE OTHER WHETHER
13 FROM 2007 TO 2023 THAT WAS THE SAME WAY
14 IT DISPLAYED INTERNALLY?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. THAT INFORMATION IS NOT PART
18 -- AS FAR AS I KNOW, HAS NOT BEEN
19 PRODUCED IN THIS CASE. SO I WOULDN'T
20 KNOW WHAT THE INTERNAL VIEW OF GOOGLE
21 CHAT WAS THROUGH THAT WHOLE ENTIRE PERIOD
22 OF TIME. BUT WHAT I DO KNOW IS WHAT I'VE
23 SEEN FROM THE EMAILS THAT WERE PRODUCED,
24 THE EMAILS AND CHATS THAT HAVE BEEN
25 PRODUCED.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 265

1 Q. OKAY. SO YOU HAVE AN OPINION
2 IN THIS CASE REGARDING THE BURDEN IT
3 WOULD HAVE BEEN ON GOOGLE TO -- FOR
4 ADMINS TO SAVE EVERY SINGLE CHAT MESSAGE
5 SENT BY AN EMPLOYEE ON LITIGATION HOLD
6 SUCH THAT THEY COULDN'T EVEN CHANGE IT TO
7 "HISTORY OFF". DO YOU KNOW WHAT I'M
8 TALKING ABOUT?

9 A. I DO. CAN YOU REFER ME TO
10 WHICH OPINION?

11 Q. SURE. WE CAN GO TO PAGE 16,
12 PARAGRAPH 77. YOU OPINE THAT IT WOULDN'T
13 HAVE BEEN BURDENSOME OR EXPENSIVE FOR
14 GOOGLE DEVELOPERS TO HAVE PUT IN PLACE
15 SOME CODE TO DO JUST THAT, RIGHT, SIR?

16 A. THAT'S MY OPINION.

17 Q. ARE YOU AN EXPERT IN WRITING
18 COMPUTER CODE?

19 A. NO.

20 Q. TELL ME HOW MUCH IT WOULD HAVE
21 COST?

22 A. I MADE THIS OPINION IN THE
23 CONTEXT OF, AGAIN, THE DIFFERENT
24 DOCUMENTS, DEPOSITION TRANSCRIPTS I
25 REVIEWED, AND THE FEATURES THAT WERE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 266

1 ALREADY AVAILABLE TO GOOGLE CUSTOMERS AT
2 THE TIME THERE THIS TOOK PLACE.

3 Q. OKAY. LET ME ASK A BETTER
4 QUESTION.

5 HOW MUCH WOULD IT HAVE COST
6 GOOGLE FOR THE LAST 17 YEARS TO SAVE ALL
7 CHATS FOR ALL EMPLOYEES SUBJECT TO HOLD?

8 A. I COULDN'T GIVE YOU AN EXACT
9 AMOUNT BUT FOR A COMPANY THE SIZE OF
10 GOOGLE THAT ACTUALLY STORES MOST OF THE
11 INTERNET'S -- A GOOD PORTION OF THE
12 INTERNET'S INFORMATION, I DON'T THINK --
13 I KNOW IT WOULD NOT BE BURDENSOME TO
14 MAINTAIN THAT INFORMATION.

15 MS. NAJAM: OKAY. I'LL OBJECT
16 AS NONRESPONSIVE. TOTALLY
17 UNDERSTAND YOUR OPINION WHICH IS IN
18 YOUR REPORT.

19 Q. I'M ASKING, DO YOU HAVE A COST
20 ESTIMATE OF HOW MUCH IT WOULD HAVE COST
21 TO STORE EVERY SINGLE CHAT SENT BY EVERY
22 EMPLOYEE UNDER LITIGATION HOLD FOR 17
23 YEARS?

24 A. I'M -- I THINK YOU'RE ASKING
25 TWO DIFFERENT THINGS. BECAUSE I THOUGHT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 267

1 EARLIER YOU WERE TALKING ABOUT THE COST
2 TO MAKE THE CHANGE, OR IS THAT NOT WHAT
3 YOU'RE ASKING?

4 Q. IT WAS CONFUSING. THAT'S WHY
5 I ASKED THE SECOND QUESTION. HOW MUCH
6 WOULD IT HAVE COST TO STORE --

7 A. TO STORE -- TO STORE CHATS, IN
8 MY EXPERIENCE, WOULD BE NOT AS MUCH AS IT
9 WOULD GENERALLY COST TO STORE EMAIL DATA.
10 SO GOOGLE WAS ALREADY PRESERVING THE
11 EMAIL DATA FOR EMPLOYEES SUBJECT TO
12 LITIGATION HOLDS. AND TO ADD THE CHATS,
13 AGAIN, I CAN'T GIVE YOU AN EXACT NUMBER.
14 I WOULDN'T -- I'M NOT AN EMPLOYEE AT
15 GOOGLE THAT DETERMINES THE COST OF
16 INTERNAL STORAGE. BUT TO STORE CHATS
17 YOU'RE GOING TO HAVE A LOT FEWER
18 ATTACHMENTS, PDFS, WORD DOCUMENTS, ZIP
19 FILES. IT'S JUST TEXT.

20 MS. NAJAM: OKAY. I'LL OBJECT
21 AS NONRESPONSIVE.

22 Q. I READ THAT IN YOUR REPORT.
23 CAN YOU JUST GIVE ME AN ANSWER TO THE
24 QUESTION?

25 ISN'T IT TRUE THAT YOU HAVE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 268

1 NOT UNDERTAKEN AN ANALYSIS THAT COULD
2 ACTUALLY GIVE US A DOLLAR NUMBER FOR THE
3 COST OF STORAGE WHILE THAT DATA FOR 17
4 YEARS?

5 A. THAT'S CORRECT.

6 Q. OKAY. AND IN TERMS OF THE
7 BURDENSOMENESS OF MAKING THE CHANGE
8 EARLIER, LET'S TALK ABOUT THAT NEXT.

9 HAVE YOU EVER BEEN AN
10 ADMINISTRATOR OF A GOOGLE WORKSPACE?

11 A. I'VE LOGGED IN AS AN
12 ADMINISTRATOR, YES.

13 Q. YOU LOGGED IN AS ONE, MEANING
14 YOU HAD SOME ELSE'S LOGIN AND THEY WERE
15 THE ACTUAL ADMINISTRATOR?

16 A. NO. I HAVE A GOOGLE ACCOUNT
17 WHERE I'M THE ADMINISTRATOR AND THERE'S A
18 USER. IT'S -- IT'S MY OWN ACCOUNT.

19 Q. SO THERE IS NO --

20 A. I'M NOT -- I'VE NOT SERVED AS
21 AN ADMINISTRATOR FOR A COMPANY. I THINK
22 THAT'S WHAT YOU'RE ASKING.

23 Q. YES. THANK YOU.

24 HAVE YOU EVER PROVIDED, LIKE,
25 PROFESSIONAL GUIDANCE AS AN EDISCOVERY

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 269

1 ATTORNEY OR SPECIALIST TO SOMEONE WHO IS
2 ADMINISTERING A GOOGLE WORKSPACE FOR AN
3 ENTIRE COMPANY?

4 A. IN CONNECTION WITH
5 REPRESENTATION IN CONNECTION WITH ONGOING
6 LITIGATIONS, YES.

7 Q. YOU MEAN YOU GIVE ADVICE TO A
8 CLIENT AND THAT CLIENT USED GOOGLE
9 WORKSPACE?

10 A. I WORK WITH CLIENTS THAT USE
11 GOOGLE WORKSPACE AND WORK WITH THE
12 ADMINISTRATORS.

13 Q. HAVE YOU EVER WITNESSED AN
14 ADMINISTRATOR OF A GOOGLE WORKSPACE TO BE
15 ABLE TO GO THROUGH AND SELECT JUST
16 PARTICULAR EMPLOYEES TO PREVENT ONLY THEM
17 FROM TOGGLING "HISTORY ON" IN CHAT?

18 A. I HAVEN'T SET THAT UP WITH AN
19 ADMINISTRATOR BUT IT'S MY UNDERSTANDING
20 THAT SUCH EMPLOYEES CAN BE PLACED IN A
21 GROUP THAT WOULD THEN BE PRESERVED WITH
22 "HISTORY ON" FOR CHATS.

23 Q. WE'LL COME BACK TO THAT, BUT I
24 STILL WANT A CLEAN ANSWER TO MY QUESTION.
25 HAVE YOU EVER ACTUALLY SEEN AN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 270

1 ADMINISTRATOR OF A GOOGLE WORKSPACE GO
2 THROUGH AND SELECT JUST PARTICULAR
3 EMPLOYEES TO PREVENT ONLY THEM FROM
4 TOGGLING "HISTORY ON" ?

5 A. I'VE NOT SEEN AN ADMINISTRATOR
6 DO THAT.

7 Q. AND IT'S YOUR UNDERSTANDING
8 THAT YOU CAN DO THAT AS LONG AS YOU FORM
9 GROUPS; DID I HEAR YOU RIGHT?

10 A. YES.

11 Q. WITHIN THE GOOGLE WORKSPACE
12 AREN'T THEY ACTUALLY CALLED
13 ORGANIZATIONAL UNITS?

14 A. THEY'RE ALL -- I BELIEVE
15 THEY'RE CALLED ORGANIZATIONAL UNITS. I
16 BELIEVE THERE IS ANOTHER NAME FOR IT AS
17 WELL BUT ORGANIZATIONAL UNITS IS ONE OF
18 THE TERMS WITHIN GOOGLE WORKSPACE.

19 Q. DID YOU READ [REDACTED]
20 TESTIMONY, THE 30(B)(6) GOOGLE
21 REPRESENTATIVE WHO TESTIFIED ABOUT CHAT
22 RETENTION?

23 A. I DID.

24 Q. WHAT WAS HIS TESTIMONY ON THE
25 FEASIBILITY OF CREATING ORGANIZATIONAL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 271

1 UNITS AND APPLYING TO THOSE FOLKS --

2 SORRY. LET ME BACK UP.

3 DID YOU READ HIS TESTIMONY
4 ABOUT WHY GOOGLE DID NOT CREATE
5 ORGANIZATIONAL UNITS FOR FOLKS ON
6 LITIGATION HOLD TO APPLY TO THEM ONLY THE
7 INABILITY TO TOGGLE "HISTORY OFF"?

8 MR. RENARD: OBJECTION, FORM.

9 A. I REMEMBER THAT DISCUSSION,
10 YES.

11 Q. WHAT DID HE SAY?

12 MR. RENARD: OBJECTION, FORM.

13 A. I BELIEVE MY RECOLLECTION IS
14 THAT HE STATED THAT HE WAS -- IN HIS
15 OPINION HE -- THAT THAT WAS A FEATURE
16 ALLOWED FOR CUSTOMERS AND WAS NOT
17 AVAILABLE INTERNALLY AT GOOGLE AND WOULD
18 HAVE REQUIRED HUNDREDS OF HOURS TO PUT IN
19 PLACE.

20 Q. OKAY. DID YOU REVIEW ANY -- DO
21 YOU RECALL ANY OTHER TESTIMONY BY [REDACTED]
22 [REDACTED] ABOUT HIS INVESTIGATION INTO
23 WHETHER ORGANIZATIONAL UNITS COULD
24 ACTUALLY BE BROKEN OUT IN GOOGLE CHAT FOR
25 THE PURPOSES OF WHAT WE'RE TALKING ABOUT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 272

1 HERE, SELECTING LITIGATION HOLD
2 EMPLOYEES, FINDING THEM, TOGGLING THEIR
3 HISTORY TO STICKY "ON"?

4 MR. RENARD: OBJECTION, FORM.

5 A. AGAIN, I BELIEVE HE SAID THAT
6 AT THE TIME THAT COULDN'T BE DONE
7 INTERNALLY BUT THAT CUSTOMERS COULD MAKE
8 THAT CHANGE.

9 Q. IN REFERENCE TO [REDACTED]'S
10 TESTIMONY THAT ULTIMATELY WHEN THE CHANGE
11 DID HAPPEN -- WE HAVEN'T TALKED ABOUT
12 THAT YET, IT HAPPENED ON FEBRUARY 8TH,
13 2023, RIGHT?

14 A. THAT'S MY UNDERSTANDING.

15 Q. AND HE TESTIFIED THAT IT TOOK
16 HUNDREDS OF HOURS TO DEVELOP AND DEPLOY.
17 DO YOU RECALL THAT?

18 A. I DO RECALL THAT.

19 Q. YOU'RE NOT CONTESTING THAT
20 FACTUAL EXPLANATION, ARE YOU?

21 A. I AGREE THAT'S WHAT HE SAID.

22 Q. ANY REASON TO THINK THAT'S
23 FALSE?

24 A. I COULDN'T SAY WHETHER THAT'S
25 TRUE OR FALSE. I DON'T OVERSEE THESE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 273

1 EMPLOYEES .

2 Q. I JUST REALIZED I ONLY HAVE
3 ONE COPY OF [REDACTED] TRANSCRIPT. OH,
4 DO I HAVE MORE?

5 (GRANDE EXHIBIT 15, TRANSCRIPT
6 [REDACTED], WAS RECEIVED AND
7 MARKED ON THIS DATE FOR
8 IDENTIFICATION.)

9 Q. I'M HANDING YOU EXHIBIT 15.
10 WATCH OUT, THAT STICKER MAY HAVE LOST ITS
11 STICK. HERE IS ANOTHER COPY. ALL I'VE
12 DONE IS WRITE EXHIBIT 15. AND I WANT TO
13 GO TO PAGE 198. ARE YOU THERE?

14 A. A-HUM.

15 Q. ON PAGE 198, LINE 16, HE WAS
16 ASKED WHETHER GOOGLE HAS THE TECHNICAL
17 ABILITY TO CREATE SEPARATE ORGANIZATIONAL
18 UNITS THAT INCLUDE LEGAL HOLD RECIPIENTS
19 AND THEN CHANGE THE CHAT RETENTION FOR
20 THAT ORGANIZATIONAL UNIT. DO YOU SEE
21 THAT QUESTION?

22 A. YES.

23 Q. AND WHAT HE RESPONDED THERE
24 WAS A TECHNICAL CAPABILITY BUT THAT HE
25 INVESTIGATED AND WAS TOLD BY THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 274

1 TECHNICAL EXPERTS THAT THAT WAS NOT
2 ADVISED AND NOT PERMITTED. DO YOU SEE
3 THAT, SIR?

4 A. I DO.

5 Q. OKAY. AND THEN -- WE'RE NOT
6 GOING TO GO THROUGHOUT PAGES BUT YOU SEE
7 THAT HE TESTIFIED FOR A FEW PAGES ON WHAT
8 KIND OF FEEDBACK HE GOT IN TERMS OF THE
9 IMPLICATIONS OF SETTING UP A NEW
10 ORGANIZATIONAL UNIT IN GOOGLE WORKSPACE
11 JUST FOR THIS PURPOSE?

12 A. YES.

13 Q. OKAY. ARE YOU HERE OPINING AS
14 AN EXPERT THAT [REDACTED] WAS MISREPORTING
15 THE FEEDBACK HE GOT FROM THE ENGINEERS?

16 A. I'M OPINING AS AN EXPERT THAT
17 GOOGLE IS IN THE BUSINESS OF CREATING
18 GOOGLE CHAT AND GOOGLE EMAIL. THIS IS NOT
19 A COMPANY THAT'S USING A THIRD-PARTY
20 PLATFORM AND HAVING TROUBLE SETTING IT UP
21 AND IF, YOU KNOW, THEY HAD OPTIONS
22 AVAILABLE TO CUSTOMERS TO PUT EMPLOYEES
23 ON LITIGATION HOLD TO PRESERVE THEIR CHAT
24 MESSAGES. AND IT MAY HAVE TAKEN SOME
25 TIME BUT I BELIEVE IT WAS FEASIBLE FOR

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 275

1 GOOGLE TO MAKE THESE CHANGES INTERNALLY
2 IN AN EARLIER DATE THAN FEBRUARY 2023.

3 MS. NAJAM: I'M OBJECT AT
4 NONRESPONSIVE.

5 Q. WE'RE GOING TO LOOK AT YOUR
6 OPINIONS ABOUT WHAT WAS AVAILABLE TO
7 CUSTOMERS. I WANT TO TALK ABOUT WHAT [REDACTED]
8 [REDACTED] SAID IN HIS DEPOSITION WAS THE
9 FEEDBACK FROM ENGINEERS REGARDING THE
10 POSSIBILITY OF CREATING UNITS SO THAT
11 ONLY LITIGATION HOLD EMPLOYEES COULDN'T
12 TURN "HISTORY ON".

13 MY QUESTION FOR YOU, WHICH I
14 WILL REPEAT, IS ARE YOU OPINING HERE AS
15 AN EXPERT THAT [REDACTED] WAS
16 MISREPRESENTING THE FEEDBACK HE GOT FROM
17 THE ENGINEERS?

18 A. NO, I'M NOT.

19 Q. AND ARE YOU OPINING HERE AS AN
20 EXPERT THAT THE ENGINEERS INSIDE GOOGLE
21 WERE WRONG?

22 A. WRONG ABOUT WHAT?

23 Q. ABOUT THE IMPLICATIONS OF
24 MAKING THE ORGANIZATIONAL UNIT CHANGE
25 WITHIN THE WORKSPACE?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 276

1 A. I DON'T DISAGREE --

2 MR. RENARD: OBJECT TO FORM.

3 A. I DON'T DISAGREE THAT IT WOULD
4 HAVE BEEN DIFFICULT.

5 Q. SO LET'S TALK ABOUT THE
6 VERSIONS MADE AVAILABLE -- VERSIONS MADE
7 AVAILABLE TO CUSTOMERS.

8 FIRST OF ALL, ARE YOU ABLE TO
9 TESTIFY TODAY THAT WHATEVER VERSIONS OF
10 GOOGLE WORKSPACE WERE BEING USED BY
11 PARTICULAR GOOGLE CUSTOMERS THAT THAT
12 SAME FUNCTIONALITY WAS ALREADY AVAILABLE
13 WITHIN GOOGLE FOR ITS OWN WORKSPACE?

14 A. SORRY. CAN YOU REPHRASE THAT?

15 Q. YOU MENTIONED BEFORE THAT
16 GOOGLE WAS ABLE TO DO CERTAIN THINGS FOR
17 ITS CUSTOMERS IN TERMS OF CUSTOMERS USING
18 GOOGLE CHAT. DO YOU RECALL THAT?

19 A. YES.

20 Q. AND ONE OF THE THINGS YOU SAID
21 IS THAT THEY PROVIDED FUNCTIONALITY FOR
22 CUSTOMERS TO EMPLOY LITIGATION HOLD
23 RETENTION OF CHATS. DID I HEAR THAT
24 RIGHT?

25 A. YES, TO PUT "HISTORY ON" OR TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 277

1 FORCE HISTORY ON OR OFF.

2 Q. FOR ALL USERS, RIGHT?

3 A. OR FOR CERTAIN USERS.

4 Q. ARE YOU ABLE TO TESTIFY UNDER
5 OATH THAT THERE WAS A CUSTOMER OF GOOGLE
6 CHAT PRIOR TO 2023 WHO HAD A VERSION OF
7 THE PRODUCT WHERE THEY COULD ONLY SELECT
8 CERTAIN PEOPLE WHO COULDN'T CHANGE THE
9 HISTORY TO OFF?

10 A. BASED UPON EXHIBITS TO MY
11 REPORT AND THE WAY IN WHICH GOOGLE
12 PROVIDED THAT INFORMATION, THAT IS MY
13 UNDERSTANDING.

14 Q. OKAY. AND IS IT -- IN TERMS OF
15 THE DOCUMENTS YOU RELIED ON, THE ONES YOU
16 CITED IN YOUR REPORT, IS THAT PAGE 17,
17 PARAGRAPH 80?

18 A. YES, THAT'S ONE OF THE
19 PARAGRAPHS.

20 Q. AND IF YOU LOOK AT THE NEXT
21 PAGE YOU'VE ACTUALLY EXCERPTED FROM A
22 2015 GOOGLE BLOG POST; IS THAT RIGHT?

23 A. THAT'S CORRECT.

24 MR. RENARD: COUNSEL, WHEN WE
25 GET TO A CONVENIENT BREAKING POINT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 278

1 WE'VE BEEN GOING ABOUT AN HOUR-TEN.

2 MS. NAJAM: SURE.

3 Q. SIR, DO YOU HAVE ANY EXPERTISE
4 ON WHAT IT MEANS IN THE LEFT-TOP CORNER
5 FOR A CHAT SETTING TO BE LOCALLY APPLIED
6 WITHIN GOOGLE WORKSPACE?

7 A. IF YOU'D LIKE ME TO TALK ABOUT
8 THIS IT WOULD HELP TO SEE THE WHOLE
9 DOCUMENT THAT WAS CITED TO AT THIS POINT.

10 Q. YOU EXCERPTED THIS TO MAKE THE
11 POINT YOU WANTED TO MAKE IN THIS REPORT,
12 RIGHT?

13 A. THAT'S RIGHT.

14 Q. SO LET'S STICK WITH WHAT YOU
15 CITED. YOU CITED A SNAPSHOT THAT HAS
16 SOMETHING THAT SAYS "LOCALLY APPLIED".

17 CAN YOU TELL US UNDER OATH
18 THAT YOU KNOW WHAT THAT MEANS?

19 A. IT'S MY UNDERSTANDING "LOCALLY
20 APPLIED" WOULD APPLY TO THAT USER GROUP
21 THAT WOULD WE REFERRED TO EARLIER OR THE
22 ENTIRE ORGANIZATION.

23 Q. YOU SAID IT'S MY
24 UNDERSTANDING. REMIND ME WHAT IS YOUR
25 UNDERSTANDING BASED ON?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 279

1 A. MY RECOLLECTION OF SEEING THE
2 ENTIRE DOCUMENT AND HOW THIS WORKS.

3 Q. AND AM I RIGHT THAT A LARGE
4 PART OF YOUR OPINION THAT GOOGLE DIDN'T
5 COMPLY WITH INDUSTRY STANDARDS IS BASED
6 ON YOUR OPINION THAT IT WOULD HAVE BEEN
7 EASY TO MAKE THE CHANGE IT ULTIMATELY
8 MADE IN FEBRUARY OF '23? IT WOULD HAVE
9 BEEN EASY TO DO THAT YEARS EARLIER, TRUE?

10 MR. RENARD: OBJECTION TO
11 FORM.

12 A. NO, THAT IS NOT MY OPINION.

13 Q. IT'S NOT YOUR OPINION THAT
14 GOOGLE COULD HAVE EASILY MADE THAT CHANGE
15 BEFORE FEBRUARY OF 2023?

16 MR. RENARD: OBJECTION TO
17 FORM.

18 A. IT'S MY OPINION GOOGLE COULD
19 HAVE MADE THAT CHANGE PRIOR TO FEBRUARY
20 OF 2023. IT MAY HAVE TAKEN SOME TIME, BUT
21 I DON'T THINK IT WAS A BURDENSOME --
22 BURDENSOME FOR THEM TO HAVE MADE THAT
23 CHANGE AT AN EARLIER DATE.

24 Q. SO BACK TO MY PREVIOUS
25 QUESTION. THAT'S AN IMPORTANT PART,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 280

1 ISN'T IT, OF YOUR VIEW THAT GOOGLE DID
2 SOMETHING WRONG HERE?

3 MR. RENARD: OBJECTION TO
4 FORM.

5 A. I WOULD SAY THAT RELATED --
6 THE BASIS FOR MANY OF MY OPINIONS DOES
7 RELATE TO THE FACT THAT THE CHANGE TO
8 RETAIN -- TO PRESERVE CHATS COULD HAVE
9 BEEN MADE AT AN EARLIER DATE AND GOOGLE,
10 AS A COMPANY THAT CREATES THE CHAT
11 PLATFORM, HAD THAT ABILITY TO MAKE THAT
12 CHANGE.

13 Q. AND IN YOUR WORDS, THAT'S
14 SOMETHING THAT MAKES GOOGLE'S SPOILIATION
15 IN THIS CASE SO DAMNING, RIGHT?

16 A. THAT'S WHAT I STATED, YES.

17 MS. NAJAM: WE CAN TAKE A
18 BREAK.

19 VIDEOGRAPHER: TIME IS 4:35

20 P.M. WE'RE GOING OFF THE RECORD.

21 (RECESS IS TAKEN.)

22 VIDEOGRAPHER: THE TIME IS
23 APPROXIMATELY 4:54 P.M. WE ARE
24 BACK ON THE RECORD.

25 Q. MR. GRANDE, WE ARE -- I CAN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 281

1 TELL YOU WE'RE IN THE HOMESTRETCH, SO I
2 HAVE A LITTLE BIT OVER AN HOUR LEFT ON
3 THE RECORD.

4 A. SOUNDS GOOD.

5 Q. WE ARE GOING TO START BY
6 LOOKING AT YOUR DECLARATION, WHICH IS
7 EXHIBIT 9. IT SHOULD BE ON THE TOP OF
8 YOUR STACK. CAN YOU PLEASE TURN TO PAGE
9 6, PARAGRAPH O?

10 SO BEFORE WE LOOKED AT YOUR
11 DECLARATION BEFORE THE BREAK YOU HAD
12 TALKED ABOUT YOUR OPINION ABOUT HOW
13 GOOGLE COULD HAVE EASILY PRESERVED CHATS
14 FOR SELECTED USERS FOR YEARS BUT CHOSE
15 NOT TO. DO YOU RECALL THAT?

16 A. CAN YOU REPEAT WHAT YOU SAID?

17 Q. I'LL MAKE THIS EASIER. SINCE
18 YOU'RE LOOKING AT THE DECLARATION, IN
19 PARAGRAPH O OF YOUR DECLARATION YOU OPINE
20 THAT GOOGLE COULD HAVE SET THE "HISTORY
21 ON" FOR LITIGATION HOLD RECIPIENTS BUT IT
22 CHOSE NOT TO UNTIL FEBRUARY OF 2023,
23 RIGHT, SIR?

24 A. YES.

25 Q. AND WHAT YOU MEANT THERE WAS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 282

1 IT COULD HAVE NOT JUST SET IT ON BUT MADE
2 IT UNCHANGEABLE FOR THOSE FOLKS, RIGHT?

3 A. YES.

4 Q. AND IN SUPPORT OF THAT YOU
5 CITE FOR THE COURT A DOCUMENT FROM 2019
6 WHERE YOU SAY GOOGLE INFORMED ITS
7 FINANCIAL SERVICES CLIENTS THERE THEY
8 WOULD BE ABLE TO SET THE DEFAULT GOOGLE
9 CHAT HISTORY SETTING FOR THEIR CHATS TO
10 "HISTORY ON" AND THAT OTHER USERS WOULD
11 NOT BE ABLE TO CHANGE THE SETTING. DID I
12 READ THAT CORRECTLY?

13 A. YES.

14 Q. IS IT YOUR OPINION THAT GOOGLE
15 IN 2019 TOLD ITS FINANCIAL SERVICES
16 CUSTOMERS THAT IT WAS GOING TO PROVIDE
17 THEM A WAY FOR JUST A SUBSET OF THEIR
18 EMPLOYEES TO BE UNABLE TO TURN "HISTORY
19 OFF" ?

20 MR. RENARD: OBJECTION, FORM.

21 A. I DON'T STATE THAT DIRECTLY
22 BUT FROM THE DOCUMENTS THAT WERE --
23 REGARDING -- REGARDING THE FINRA CHANGES
24 I DO BELIEVE FROM THE DESCRIPTION THERE
25 WAS INDICATION THAT IT COULD BE APPLIED

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 283

1 TO CERTAIN GROUPS OR CERTAIN GROUPS OF
2 CUSTODIANS SUCH AS BROKER-DEALERS.

3 Q. SORRY. AND THE "IT" IN YOUR
4 SENTENCE ARE WE TALKING ABOUT THE ABILITY
5 TO TURN "HISTORY OFF" ONCE FORCED ON?

6 A. THAT'S CORRECT.

7 Q. NOW, LET'S LOOK AT WHAT YOU
8 CITED IN FOOTNOTE 12. THAT'S THE
9 DOCUMENT WE WOULD LOOK TO FOR YOUR
10 STATEMENT TO THE COURT, RIGHT?

11 A. I BELIEVE SO. THAT'S THE RIGHT
12 DOCUMENT.

13 Q. I'VE MARKED IT AS EXHIBIT 16.
14 (GRANDE EXHIBIT 16, INTERNAL
15 GOOGLE DOCUMENT, WAS RECEIVED AND
16 MARKED ON THIS DATE FOR
17 IDENTIFICATION.)

18 Q. CAN YOU CONFIRM THIS IS THE
19 CORRECT DOCUMENT TO THE ONE YOU'RE
20 REFERRING TO IN YOUR DECLARATION? IT'S
21 THE SAME BATES PAGE, RIGHT?

22 A. YES.

23 Q. AND SIR, YOU TOLD THE COURT
24 THAT GOOGLE INFORMED ITS FINANCIAL
25 SERVICES CLIENTS OF THIS FEATURE. WHAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 284

1 DOES IT SAY AT THE BOTTOM OF THIS PAGE?

2 A. "CONFIDENTIAL, INTERNAL ONLY"
3 IN THE MIDDLE.

4 Q. AND IN FACT, THIS IS PART OF A
5 DRAFT DOCUMENT THAT WAS INTERNAL TO
6 GOOGLE, AM I RIGHT?

7 A. YES.

8 Q. IN FACT, OTHER PAGES OF THIS
9 SAME DOCUMENT HAD COMMENT BUBBLES, THE
10 KIND YOU WOULD SEE IN A DRAFT DOCUMENT,
11 RIGHT, SIR?

12 A. YES. AND MY STATEMENT SAYS
13 INFORMED CLIENTS THAT THEY WOULD BE ABLE
14 TO SET THE HISTORY TO ON. OKAY.

15 Q. MAYBE WE'RE MISSING EACH
16 OTHER. IN EXHIBIT 16 GOOGLE ISN'T
17 INFORMING ITS CLIENTS OF ANYTHING, IS IT?

18 A. NOT IN THIS PARTICULAR
19 COMMUNICATION.

20 Q. IT'S, IN FACT, AN INTERNAL
21 DOCUMENT ABOUT A FEATURE THAT IS IN ALPHA
22 TESTING FOR FINRA CLIENTS, RIGHT?

23 A. AT THIS POINT, YES.

24 Q. IS THERE SOME OTHER DOCUMENT
25 WHERE YOU SAW GOOGLE TELLING ITS FINRA

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 285

1 CLIENTS; HEY, WE HAVE THIS NEW FEATURE
2 WHERE YOU CAN SELECT CERTAIN USERS AND
3 NOT LET THEM TOGGLE "HISTORY OFF" LIKE
4 BROKER-DEALERS?

5 A. I DO RECALL THERE BEING
6 ANOTHER DOCUMENT.

7 Q. CAN YOU TELL US WHAT IT IS?

8 A. I DON'T BELIEVE I HAVE IT
9 CITED HERE.

10 Q. IS IT CITED IN YOUR REPORT?

11 A. I'M NOT SURE.

12 Q. AND IN ANY EVENT, IF YOU LOOK
13 UNDER CHAT SETTINGS, THE ONLY DIFFERENCE
14 BETWEEN THIS WINDOW AND THE ONE WE JUST
15 LOOKED AT IN YOUR REPORT, IF YOU WANT TO
16 GO BACK IT IS PAGE 18 -- LET ME PUT IT
17 THIS WAY, FOR CHAT OPTIONS THEY'RE THE
18 SAME, RIGHT?

19 A. RIGHT. FOR -- IT'S A LITTLE
20 DIFFERENT SETUP BUT IT LOOKS FAMILIAR.

21 Q. AND FOR THE FINRA ALPHA TEST
22 IT HAS DIFFERENT OPTIONS THAT HAS
23 SOMETHING TO DO WITH CHATTING OUTSIDE THE
24 ORGANIZATION, RIGHT?

25 A. THAT'S RIGHT.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 286

1 Q. AND I THINK I ALREADY ASKED
2 YOU THIS IN TERMS OF YOUR EXPERIENCE WITH
3 ADMINISTRATORS OF GOOGLE WORKSPACES.

4 LET ME ASK YOU MORE BROADLY.
5 SITTING HERE TODAY, HAVE YOU ACTUALLY
6 EVER WITNESSED ANY COMPANY WHO IS USING
7 GOOGLE CHAT BE ABLE TO ISOLATE LITIGATION
8 HOLD EMPLOYEES ONLY AND PHYSICALLY
9 PREVENT THEM FROM TOGGLING "HISTORY
10 OFF" -- SORRY -- THEM AND ONLY THEM?

11 MR. RENARD: OBJECTION, FORM.

12 A. I'M AWARE. I HAVE NOT WORKED
13 WITH AN EXTERNAL COMPANY ADMINISTRATOR
14 BUT I OBVIOUSLY DO KNOW THAT GOOGLE WAS
15 ABLE TO DO THIS IN FEBRUARY OF 2023.

16 Q. OKAY. BESIDES GOOGLE
17 IMPLEMENTING THE CHANGE, CAN YOU NAME ANY
18 OTHER COMPANY WHO PRIOR TO THAT DATE WAS
19 ABLE TO DO THAT USING GOOGLE CHAT?

20 A. I'VE NOT WORKED WITH SUCH A
21 COMPANY, BUT, AGAIN, BASED ON WHAT I SAID
22 IN MY REPORT THAT I BELIEVE THAT OPTION
23 WAS AVAILABLE.

24 MS. NAJAM: OKAY. I'LL OBJECT
25 TO EVERYTHING AFTER THE WORD

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 287

1 "INCLUDING" AND AFTER THE WORD

2 "BUT" AS NONRESPONSIVE.

3 Q. WE'RE GOING TO SWITCH GEARS,
4 SO YOU CAN PUT THE DECLARATION ASIDE.

5 DO YOU AGREE THAT IT IS
6 IMPORTANT IN A DISPUTE INVOLVING A
7 COMPANY WITH ESI FOR PARTIES TO CONFER
8 EARLY ON ABOUT WHAT THE COMPANY'S THEN
9 CURRENT RETENTION PRACTICES ARE?

10 MR. RENARD: OBJECTION, FORM.

11 A. I DO BELIEVE THE
12 MEET-AND-CONFER CONFERENCES CAN BE AN
13 IMPORTANT PART OF THE DISCOVERY PROCESS.

14 Q. OKAY. BUT MY QUESTION WAS A
15 LITTLE DIFFERENT, SO I'LL JUST STATE IT
16 AGAIN.

17 DO YOU AGREE IT'S IMPORTANT IN
18 A DISPUTE INVOLVING A COMPANY WITH ESI
19 FOR PARTIES TO CONFER EARLY ON ABOUT WHAT
20 THE COMPANY'S THEN CURRENT RETENTION
21 PRACTICES ARE?

22 MR. RENARD: SAME OBJECTION.

23 A. I BELIEVE IT'S IMPORTANT THAT
24 PARTIES MEET AND CONFER EARLY ON TO
25 UNDERSTAND THE DATA BEING PRESERVED AND

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 288

1 COLLECTED IN THAT CASE.

2 Q. OKAY. AND IN TERMS OF THE
3 FEDERAL RULES OF CIVIL PROCEDURE, ONE WAY
4 THEY HAVE ATTEMPTED TO REIN IN THE
5 DISCOVERY OF ESI IS TO FORCE COUNSEL TO
6 VET THE ISSUES AT VERY EARLY STAGES OF
7 THE CASE, TRUE?

8 MR. RENARD: OBJECTION, FORM.

9 A. AS I SAID IN MY EARLIER
10 QUESTION YES, COUNSEL ARE ENCOURAGED TO
11 MEET AND CONFER AS PER 26(B) AND OTHER,
12 AND LOCAL RULES AS WELL.

13 Q. DID YOU MEAN 26(F)?

14 A. YES, SORRY. 26(F).

15 Q. WE'RE GOING TO TALK ABOUT
16 26(F) BUT MY QUESTION WAS A LITTLE
17 DIFFERENT.

18 ONE WAY THE RULES, INCLUDING
19 26(F), THEY ATTEMPT TO REIN IN THE
20 DISCOVERY OF ESI IS BY FORCING COUNSEL TO
21 VET ISSUES AT VERY EARLY STAGES OF THE
22 CASE?

23 MR. RENARD: OBJECTION, FORM.

24 A. I GUESS -- I WOULD SAY I
25 DISAGREE WITH YOUR LANGUAGE ABOUT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 289

1 "FORCE", COUNSEL, BUT THERE ARE 26(F)
2 REQUIREMENTS TO MEET AND CONFER AND THOSE
3 SHOULD BE, YOU KNOW, COMPLIED WITH.

4 Q. WHAT IS RULE 26(F)?

5 A. IT'S A PROVISION OF THE
6 FEDERAL RULES REGARDING MEET AND CONFER
7 CONFERENCES.

8 Q. I'M HANDING YOU WHAT I MARKED
9 AS EXHIBIT 17.

10 (GRANDE EXHIBIT 17, CHAPTER
11 ENTITLED EDISCOVERY FOR CORPORATE
12 COUNSEL, WAS RECEIVED AND MARKED ON
13 THIS DATE FOR IDENTIFICATION.)

14 Q. IS THIS A CHAPTER IN A BOOK
15 CALLED EDISCOVERY FOR CORPORATE COUNSEL?

16 A. IT IS.

17 Q. YOU WROTE THIS CHAPTER, RIGHT,
18 SIR?

19 A. I DID.

20 Q. WHAT YEAR DID YOU WRITE IT IN?

21 A. I DON'T RECALL WHEN I FIRST
22 AUTHORED IT, AND THIS VERSION.

23 Q. IS THIS SOMETHING THAT YOU'VE
24 UPDATED OVER TIME?

25 A. EVERY COUPLE YEARS.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 290

1 Q. SO FAIR TO SAY YOU WOULD HAVE
2 UPDATED IT WITHIN THE LAST COUPLE OF
3 YEARS?

4 A. IT'S HARD TO TELL WHEN THIS
5 COPY WHEN IT WAS UPDATED.

6 Q. NO PROBLEM. BUT MY QUESTION IS
7 WHEN YOU DO -- SORRY. IS THIS LIKE -- IS
8 IT AVAILABLE ONLINE?

9 A. IT MAY BE BUT IT'S PART OF A
10 PUBLICATION.

11 Q. LET ME KNOW AS WE'RE GOING
12 THROUGH IF IT DAWNS ON YOU WHEN THIS WAS
13 LAST UPDATED, IF THAT'S OKAY.

14 LET'S GO TO 408 --

15 A. I DON'T THINK THIS HAS BEEN
16 UPDATED IN SOME TIME. IT DOESN'T LOOK
17 LIKE IT WAS POST 2015.

18 Q. YOU BELIEVE THIS WAS WRITTEN
19 BEFORE 2015?

20 A. I'M JUST TRYING TO --

21 Q. YOU DON'T HAVE TO GUESS, I DO
22 WANT TO LOOK AT CERTAIN PORTIONS OF IT SO
23 LET'S PLEASE TURN TO PAGE 408.

24 IN THE FIRST FULL PARAGRAPH ON
25 THIS PAGE YOU WROTE, "THE ADVENT OF

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Page 291

1 EDISCOVERY IS A PRODUCT OF CHANGES IN
2 SOCIETY AND IN THE WAY PEOPLE
3 COMMUNICATE. THE FEDERAL RULES OF CIVIL
4 PROCEDURE HAVE BEEN DESIGNED TO COPE WITH
5 THE EXPLOSION OF ELECTRONIC INFORMATION."
6 AND THEN YOU WRITE, "ONE WAY THE RULES
7 ATTEMPT TO REIN IN THE DISCOVERY OF ESI
8 IS TO FORCE COUNSEL TO VET THE ISSUES AT
9 THE VERY EARLY STAGES OF THE CASE."

10 SO I'M GOING TO PAUSE THERE.
11 EARLIER YOU DISAGREED WITH MY USE OF THE
12 WORD "FORCE COUNSEL". THOSE ARE YOUR
13 WORDS, RIGHT?

14 A. I BELIEVE I DIDN'T USE THAT
15 EXACT LANGUAGE BUT YES, THESE ARE MY
16 WORDS.

17 Q. I LITERALLY READ THAT
18 SENTENCE. YOU STILL -- YOU AGREE WITH THE
19 SENTENCE NOW THAT WE'RE SEEING IT IN YOUR
20 CHAPTER, CORRECT?

21 A. I AGREE THAT'S WHAT I STATED
22 ON THIS CHAPTER, YES.

23 Q. AND THEN YOU WRITE, "THE RULE
24 26 CONFERENCE IS INTENDED TO AVOID LATER
25 DIFFICULTIES OR EASE THEIR RESOLUTION."

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 292

1 THAT SENTENCE I JUST READ, YOU
2 ARE ACTUALLY QUOTING FROM THE ADVISORY
3 COMMITTEE NOTES FOR SOME AMENDMENTS TO
4 RULE 26(F), RIGHT, SIR?

5 A. 2006 AMENDMENTS, YES.

6 Q. OKAY. OH. WHILE WE'RE ON THIS
7 PAGE, EARLIER I ASKED YOU IF SEDONA
8 CONFERENCE WAS A LAW POLICY THINK TANK,
9 AND YOU SAID I WOULDN'T USE THOSE WORDS.
10 DO YOU RECALL THAT TESTIMONY?

11 A. I SEE I REFER TO IT HERE.

12 Q. AND THAT'S EXACTLY WHAT YOU
13 CALLED IT, RIGHT, "THE SEDONA CONFERENCE
14 A LAW AND POLICY THINK TANK?"

15 A. YES, THAT'S -- I REFER TO IT
16 THAT WAY, RIGHT.

17 Q. AND IN REFERRING TO IT YOU'RE
18 TALKING ABOUT SOMETHING THEY ISSUED
19 CALLED A COOPERATION PROCLAMATION, RIGHT,
20 SIR?

21 A. YES.

22 Q. THE PURPOSE OF WHICH WAS, AND
23 I'M QUOTING YOU TO, "REFOCUS LITIGATION
24 ON THE MERITS OF THE CASE AND NOT ON
25 EDISCOVERY ISSUES, AS WELL AS TO PROMOTE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 293

1 OPEN AND FORTHRIGHT INFORMATION SHARING
2 DIALOGUE, INTERNAL AND EXTERNAL TRAINING
3 AND THE DEVELOPMENT OF PRACTICAL TOOLS TO
4 FACILITATE COOPERATIVE, COLLABORATIVE,
5 TRANSPARENT DISCOVERY." NOW I'M GOING TO
6 PAUSE THERE.

7 DO YOU AGREE WITH THE PURPOSE,
8 AS YOU HAVE PUT IT, OF SEDONA'S
9 PROCLAMATION?

10 A. I DO.

11 Q. OKAY. AND SIR, CAN WE AGREE
12 THAT ONE OF THE VERY FIRST TOPICS OF YOUR
13 RULE 26 CONFERENCE IN YOUR VIEW SHOULD BE
14 PRESERVATION?

15 A. YES.

16 Q. AND NOW, I'M GOING TO READ
17 FROM WHAT YOU'VE WRITTEN HERE. I'M IN THE
18 FIRST FULL PARAGRAPH -- SORRY -- SECOND
19 TO LAST SENTENCE. YOU WROTE, "THE RULES
20 DO NOT CONTEMPLATE THAT EVERY SCRAP OF
21 ESI NEEDS TO BE MAINTAINED AND PRODUCED
22 IN EVERY CASE. TO THE CONTRARY, THE RULES
23 EXPECT A RATIONAL CULLING OF THE
24 DOCUMENTS NECESSARY TO THE LITIGATION
25 FROM THE FULL RANGE OF ESI IN EXISTENCE."

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 294

1 A. YES.

2 Q. AND I'M GOING TO PAUSE THERE.
3 AND AGAIN, YOUR SOURCE FOR THAT ARE THE
4 ADVISORY COMMITTEE NOTES FOR THE 2006
5 AMENDMENTS TO RULE 26(F), RIGHT?

6 A. THAT'S CORRECT.

7 Q. AND EARLIER -- WHILE WE'RE
8 LOOKING AT FOOTNOTE 4 -- EARLIER I ASKED
9 YOU WHETHER YOU AGREED WITH CERTAIN
10 STATEMENTS AND IF YOU LOOK IN FOOTNOTE 4,
11 THE SECOND SENTENCE YOU RECALL I ASKED
12 YOU WHETHER YOU AGREED WITH THIS
13 STATEMENT, "COMPLETE OR BROAD CESSATION
14 OF A PARTY'S ROUTINE COMPUTER OPERATIONS
15 COULD PARALYZE THE PARTIES' ACTIVITIES."
16 THAT'S WHAT YOU WROTE, RIGHT?

17 A. YES.

18 Q. "THE PARTIES SHOULD TAKE
19 ACCOUNT OF THESE IN THEIR DISCUSSIONS
20 WITH THE GOAL OF AGREEING ON REASONABLE
21 PRESERVATION STEPS."

22 "PARTIES" MEANING PARTIES TO
23 THE LITIGATION AT ISSUE, RIGHT?

24 A. YES.

25 Q. SO IN THE CONTEXT OF PARTIES

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Page 295

1 CONFERRING EARLY IN THE CASE ON THE SCOPE
2 -- SORRY -- ON PRESERVATION OF ESI, IS IT
3 TRUE THAT ESTABLISHING PRESERVATION
4 BOUNDARIES CAN SET GROUNDRULES FOR THE
5 PRODUCING PARTY?

6 A. I BELIEVE I -- ARE YOU STATING
7 SOMETHING THAT'S IN THIS CHAPTER OR ARE
8 YOU ASKING A QUESTION?

9 Q. LET ME FIRST ASK THE QUESTION
10 AND THEN WE CAN READ IT IF WE NEED TO.

11 IF I AM THE PRODUCING PARTY OF
12 POTENTIALLY RELEVANT ESI, CAN WE AGREE
13 THAT IT WOULD BE IMPORTANT TO ME TO AT
14 THE BEGINNING OF DISCOVERY AGREE ON THE
15 SCOPE OF THE RETENTION EFFORT TO LATER
16 AVOID A CLAIM OF SPOLIATION?

17 A. YES.

18 Q. AND THEN WHEN YOU SAY AT THE
19 END OF THAT PARAGRAPH ON PAGE 409 -- I
20 SAID THAT PARAGRAPH, I MEAN THE SECOND
21 FULL PARAGRAPH, PAGE 49 -- YOU SAY,
22 "SETTING REASONABLE LIMITS ON THE SCOPE
23 OF PRESERVATION WILL THEREFORE FOCUS THE
24 DISCOVERY PROCESS ON THE PRODUCTION OF
25 DOCUMENTS THAT NEED TO BE EXCHANGED FOR

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 296

1 PURPOSES OF THE LITIGATION AND AVOID THE
2 POTENTIAL THAT THE DISCOVERY PROCESS WILL
3 BE USED FOR GAMESMANSHIP." DID I READ
4 THAT CORRECTLY?

5 A. YES, THAT'S RIGHT.

6 Q. SO AM I SUMMARIZING WHAT YOU
7 ARE WRITING ABOUT IN THIS PARTICULAR
8 PARAGRAPH TO BE THAT IT IS BENEFICIAL TO
9 EARLY IN THE CASE BE CANDID AND HAVE
10 DISCUSSIONS ABOUT WHAT A PARTIES'
11 RETENTION POLICIES ARE FOR ESI TO AVOID
12 GAMESMANSHIP LATER ON THAT'S DISTRACTING
13 FROM THE MERITS?

14 MR. RENARD: OBJECTION TO
15 FORM.

16 A. IN THIS CHAPTER, YES, YOU
17 KNOW, I STATE THAT AND I BELIEVE THAT
18 INHERENT IN THIS IS ALSO THAT THE PARTIES
19 BE FORTHRIGHT AND TRANSPARENT IN THE DATA
20 THAT'S BEING PRESERVED AND THE DATA AT
21 ISSUE IN THE CASE.

22 Q. SO BRINGING IT BACK TO CHAT
23 MESSAGES, CAN WE AGREE THAT IN THIS CASE
24 IT WOULD HAVE BEEN IMPORTANT FOR GOOGLE
25 TO LET THE PLAINTIFFS KNOW, FOR INSTANCE,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 297

1 ITS CHAT MESSAGE RETENTION POLICIES IN
2 TERMS OF WHAT KINDS OF THINGS ARE SUBJECT
3 TO BEING SAVED AND FOR HOW LONG?

4 A. FOR GOOGLE TO PROVIDE THAT
5 INFORMATION?

6 Q. YES.

7 A. I THINK IN THE CONTEXT OF THIS
8 CASE, YES.

9 Q. AND AS YOU WRITE IN YOUR BOOK
10 CHAPTER, ONE OF THE REASONS TO DO THAT IS
11 SO THE REQUESTING PARTY, HERE THE
12 PLAINTIFFS, CAN VOICE AN OBJECTION AT
13 THAT TIME AND IT CAN BE DEALT WITH,
14 RIGHT, SIR?

15 A. IF THAT'S POSSIBLE, YES.

16 Q. LET ME HAND YOU WHAT I'M GOING
17 TO BE MARKING AS EXHIBIT 18.

18 (GRANDE EXHIBIT 18, LETTER
19 DATED FEBRUARY 7, 2020 FROM YETTER
20 COLEMAN WAS RECEIVED AND MARKED ON
21 THIS DATE FOR IDENTIFICATION.)

22 Q. SO THE REASON THE COVER PAGE
23 OF EXHIBIT 18 SAYS "EXHIBIT 5 FILED UNDER
24 SEAL" IS BECAUSE IT WAS AN EXHIBIT TO
25 YOUR DECLARATION IN SUPPORT OF THE MOTION

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 298

1 FOR SANCTIONS. I DON'T WANT YOU TO BE
2 CONFUSED BY IT. BUT CAN YOU CONFIRM THAT
3 YOU HAVE SEEN THIS FEBRUARY -- IN FACT,
4 THIS FEBRUARY 7TH, 2020 LETTER FROM
5 YETTER COLEMAN IS A DOCUMENT YOU CITED IN
6 YOUR REPORT. DO YOU RECALL THAT?

7 A. YES.

8 Q. SO YOU'VE SEEN THIS BEFORE, I
9 TAKE IT?

10 A. I HAVE AT SOME POINT.

11 Q. DID YOU KNOW THAT YETTER
12 COLEMAN AT THIS TIME WAS REPRESENTING
13 GOOGLE?

14 A. THAT'S MY UNDERSTANDING.

15 Q. AND IF YOU LOOK AT THE
16 RECIPIENT OF THE LETTER ON THE FIRST PAGE
17 IT'S THE OFFICE OF THE ATTORNEY GENERAL
18 OF THE STATE OF TEXAS, ONE OF THE
19 PLAINTIFFS IN THIS CASE, RIGHT, SIR?

20 A. YES.

21 Q. AND THE TITLE OF THE LETTER
22 SAYS "HIGHLY CONFIDENTIAL" -- SORRY -- IN
23 ADDITION TO SAYING IT'S HIGHLY
24 CONFIDENTIAL IT SAYS "CID MATERIAL". DO
25 YOU RECALL?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 299

1 A. I DO.

2 Q. AND JUST LOOKING AT THAT FIRST
3 SUBHEADING, CAN YOU CONFIRM THAT THIS
4 LETTER INVOLVES DISCUSSIONS ABOUT
5 GOOGLE'S RESPONSE TO TEXAS'S CIVIL
6 INVESTIGATIVE DEMAND BEFORE SUIT WAS
7 FILED IN THIS CASE?

8 A. YES, THAT'S HOW I READ IT.

9 Q. SO LET'S GO TO PAGE 4. AND
10 THEN THIS LETTER FROM GOOGLE'S COUNSEL IT
11 ADDRESSES THE OFFICE OF ATTORNEY
12 GENERAL'S QUESTION ABOUT HANGOUT CHANGE
13 RETENTION AND DOCUMENT HOLDS. DO YOU SEE
14 THAT?

15 A. I DO.

16 Q. AND BEFORE WE GO ANY FURTHER,
17 YOU UNDERSTAND THAT WHAT WE'VE BEEN
18 CALLING CHAT, WITH A CAPITAL C, IN THIS
19 DEPOSITION THAT IT HAS BEEN REFERRED TO
20 AS -- I'M SORRY -- IT HAD DIFFERENT NAMES
21 PREVIOUSLY LIKE HANGOUTS, BUT IT'S THE
22 SAME TOOL, RIGHT?

23 A. OR SIMILAR, YES.

24 Q. THE FIRST PARAGRAPH IN THAT
25 SECTION REFERENCES A COUPLE OF CALLS. DO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 300

1 YOU HAVE ANY IDEA WHAT WAS TALKED ABOUT
2 IN THOSE PHONE CALLS BETWEEN COUNSEL FOR
3 GOOGLE AND COUNSEL FOR TEXAS?

4 A. NO, I WAS NOT INVOLVED IN THE
5 CASE AT THAT TIME.

6 Q. HOW ABOUT SINCE THEN, HAVE YOU
7 TAKEN IT UPON YOURSELF TO FIGURE OUT WHAT
8 WAS BEING DISCUSSED?

9 A. I DON'T RECALL KNOWING WHAT
10 WAS DISCUSSED ON THOSE CALLS.

11 Q. SO IT MENTIONS THERE THAT THE
12 STATE OF TEXAS HAD "ASKED A NUMBER OF
13 FOLLOWUP QUESTIONS ABOUT GOOGLE'S
14 DOCUMENT RETENTION POLICIES FOR HANGOUT
15 CHAT MESSAGES." DO YOU SEE THAT?

16 A. YES.

17 Q. SO LET'S SEE WHAT GOOGLE'S
18 COUNSEL WROTE HERE. "GOOGLE OFFERS ITS
19 EMPLOYEES A SET OF WORK PRODUCTIVITY
20 TOOLS THAT INCLUDES AN INTERNAL MESSAGING
21 TOOL CALLED GOOGLE HANGOUTS. GOOGLE
22 HANGOUT MESSAGES BY DEFAULT ARE SET TO BE
23 "OFF THE RECORD". I'M GOING TO PAUSE
24 THERE. THAT'S ACCURATE, RIGHT?

25 A. YES.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 301

1 Q. THEN IT SAYS "'OFF THE RECORD'
2 MESSAGES ARE NOT RETAINED BY GOOGLE." I'M
3 GOING TO PAUSE THERE. THAT'S ALSO
4 ACCURATE, RIGHT, SIR, AS OF THIS DATE?

5 A. YES.

6 Q. THEN IT SAYS, "'ON THE RECORD'
7 HANGOUT CONVERSATIONS ARE KEPT FOR 30
8 DAYS." I'M GOING TO PAUSE THERE.

9 BUT AT THIS POINT IN TIME "ON
10 THE RECORD" CHATS WERE KEPT FOR AT LEAST
11 30 DAYS, RIGHT, SIR?

12 A. THAT'S CORRECT.

13 Q. SO I'LL KEEP READING. "ONCE AN
14 EMPLOYEE IS PUT ON A LEGAL HOLD, HOWEVER,
15 'ON THE RECORD' HANGOUT CONVERSATIONS ARE
16 PRESERVED FOR THE DURATION OF THE LEGAL
17 HOLD." I'M GOING TO PAUSE. THAT'S ALSO
18 ACCURATE, RIGHT?

19 A. IT IS.

20 Q. THEN IT CONTINUES TO SAY,
21 "GOOGLE INSTRUCTS CUSTODIANS ON A LEGAL
22 HOLD TO PRESERVE RELEVANT MATERIALS
23 INCLUDING AN INSTRUCTION TO PRESERVE
24 RELEVANT HANGOUT CONVERSATIONS BY PUTTING
25 THOSE CONVERSATIONS 'ON THE RECORD' ON A

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 302

1 MESSAGE-BY-MESSAGE BASIS." AND MR.

2 GRANDE, THAT'S ALSO ACCURATE, RIGHT?

3 A. THAT STATEMENT IS ACCURATE.

4 Q. AND THEN IT GOES ONTO ADDRESS
5 SOME QUESTIONS THAT THE STATES HAD ABOUT
6 "AUDITS" OF CUSTODIANS ON LEGAL HOLD. DO
7 YOU SEE THAT, WHERE I AM IN THE NEXT
8 PARAGRAPH?

9 A. YES.

10 Q. AND GOOGLE'S COUNSEL WRITES
11 "GOOGLE SENDS CUSTODIANS ON LEGAL HOLD
12 REGULAR ELECTRONIC AND ORAL REMINDERS TO
13 MAKE SURE THEY PRESERVE THEIR RELEVANT
14 MATERIALS, INCLUDING BY PUTTING ANY
15 HANGOUT CONVERSATIONS ON THE RECORD."

16 YOU'RE AWARE THAT THAT IS ALSO
17 ACCURATE, RIGHT? YOU'VE SEEN EXAMPLES OF
18 THE REMINDERS?

19 MR. RENARD: OBJECTION TO
20 FORM.

21 Q. SORRY. YOU NODDED BUT I DON'T
22 KNOW IF YOU MEANT TO ANSWER.

23 A. I WOULDN'T AGREE WITH -- I
24 MEAN, I DON'T HAVE THE BASIS TO AGREE
25 THERE WERE REGULAR ELECTRONIC AND ORAL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 303

1 REMINDERS TO MAKE SURE THEY PRESERVED
2 THEIR REGULAR MATERIALS. I HAVE SEEN A
3 REMINDER OR LANGUAGE FOR A REMINDER.

4 Q. FAIR ENOUGH. THAT PARAGRAPH
5 THAT WE WENT THROUGH SENTENCE BY
6 SENTENCES WHEREIN GOOGLE ACTUALLY
7 DESCRIBED IT'S CHAT RETENTION POLICY, IS
8 THERE ANYTHING MISLEADING ABOUT THAT
9 DESCRIPTION IN YOUR VIEW?

10 A. YES.

11 Q. WHAT IS IT?

12 A. IT'S THE FACT THAT IT'S NOT AS
13 EASY AS INDICATED FOR EMPLOYEES TO,
14 AGAIN, PUT "HISTORY ON" FOR A MESSAGE
15 THAT ANOTHER EMPLOYEE COULD TURN "HISTORY
16 OFF" AND THEN THE MESSAGE -- YOU KNOW,
17 LET'S SAY IF THEY WANTED TO PRESERVE THAT
18 MESSAGE THERE WAS NO INSTRUCTION ON HOW
19 TO PRESERVE THAT MESSAGE.

20 AGAIN, AS MENTIONED, THERE WAS
21 CONFUSION ON WHETHER THEY ACTUALLY HAD --
22 HISTORY WAS ON OR OFF, IF IT WAS --
23 AGAIN, AT THIS POINT BECAUSE IT WAS THEIR
24 -- THEY WERE DOING IT AND IT WASN'T A
25 FORCED "HISTORY ON", THERE WERE A LOT OF

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 304

1 WAYS IN WHICH THESE MESSAGES WOULD NOT BE
2 PRESERVED.

3 Q. OKAY. LET'S GO THROUGH YOUR
4 ANSWER.

5 I ASKED YOU FOR WHY THIS WAS A
6 MISLEADING DESCRIPTION AND YOU SAID "IT'S
7 NOT EASY AS INDICATED TO TURN 'HISTORY
8 ON'."

9 IS IT YOUR OPINION THAT --
10 HAVE YOU EVER SEEN A LITIGANT OR A
11 POTENTIAL LITIGANT WHEN DISCLOSING ITS
12 RETENTION POLICY TO GO INTO THE DETAILS
13 OF, LIKE, WHAT THE BUTTONS LOOK LIKE OR
14 WHAT THE INTERFACE LOOKS LIKE?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. CAN YOU REPHRASE THAT?

18 Q. SURE. WHEN TWO PARTIES ON THE
19 OPPOSITE SIDE OF ACTUAL OR ANTICIPATED
20 LITIGATION ARE MEETING AND CONFERRING
21 ABOUT A PARTIES' RETENTION OF ESI, HAVE
22 YOU EVER SEEN IT GO INTO DETAILS LIKE,
23 "HERE IS MY INTERFACE LOOKS LIKE ON MY
24 CHAT MESSAGING SYSTEM?"

25 A. NO.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 305

1 Q. SO LET ME SHOW YOU ANOTHER
2 LETTER THAT YOU CITED IN YOUR REPORT.

3 (GRANDE EXHIBIT 19, EXHIBIT 4
4 ATTACHED TO IGNATIUS GRANDE
5 DECLARATION, WAS RECEIVED AND
6 MARKED ON THIS DATE FOR
7 IDENTIFICATION.)

8 Q. EXHIBIT 19 TO YOUR DEPOSITION
9 IS WHAT WAS MARKED AS EXHIBIT 4 TO YOUR
10 DECLARATION. THIS IS A LETTER DATED
11 FEBRUARY 4TH, SO IT ACTUALLY PRECEDED THE
12 LETTER WE JUST LOOKED AT. IT IS FROM THE
13 ATTORNEY GENERAL'S OFFICE OF TEXAS AND
14 ADDRESSED TO GOOGLE'S COUNSEL. DO YOU SEE
15 THAT?

16 A. YES.

17 Q. NOW, LET'S LOOK AT WHAT
18 TEXAS'S UNDERSTANDING WAS AS OF FEBRUARY
19 4, 2020 OF GOOGLE'S CHAT RETENTION
20 PRACTICES. I'M LOOKING AT PAGE 2 OF THE
21 LETTER.

22 IN THAT SECOND PARAGRAPH IT
23 SAYS, "THE PARTIES FURTHER DISCUSSED CHAT
24 AND TEXT MESSAGES. AS WE UNDERSTAND YOUR
25 DESCRIPTION OF THIS TYPE OF COMMUNICATION

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 306

1 GOOGLE HANGOUTS MESSAGES ARE AKIN TO
2 INSTANT MESSAGES BETWEEN GOOGLE
3 EMPLOYEES." I WILL PAUSE THERE.

4 THAT'S TRUE, RIGHT, SIR?

5 MR. RENARD: I JUST WANT TO
6 OBJECT TO THE SIDEBAR LEADING UP TO
7 YOUR QUOTE FROM THE LETTER.

8 MS. NAJAM: OKAY.

9 A. THE SECOND SENTENCE -- CAN YOU
10 REPEAT THE SENTENCE?

11 Q. SURE. SO LET'S MAYBE -- LET ME
12 CURE THAT OBJECTION.

13 DO YOU UNDERSTAND THIS LETTER
14 TO HAVE BEEN WRITTEN BY THE OFFICE OF
15 ATTORNEY GENERAL OF THE STATE OF TEXAS,
16 ONE OF THE PLAINTIFFS IN THIS CASE?

17 A. YES.

18 Q. AND IN THAT SECOND PARAGRAPH
19 COUNSEL FOR TEXAS IS WRITING DOWN AND
20 CONVEYING TO GOOGLE ITS UNDERSTANDING
21 BASED ON CONVERSATIONS OF GOOGLE'S
22 RETENTION POLICY FOR CHATS, RIGHT?

23 MR. RENARD: OBJECTION, FORM.

24 A. THEY'RE INDICATING THEIR
25 UNDERSTANDING OF THE POLICY.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 307

1 Q. SO THE SECOND SENTENCE I READ
2 TO YOU, I'M NOT GOING TO READ IT AGAIN ON
3 THE RECORD, GO AHEAD, HAVING TO DO WITH
4 MESSAGES BEING AKIN TO INSTANT MESSAGES?

5 A. YES.

6 Q. THAT'S ACCURATE, RIGHT?

7 A. YES.

8 Q. THEN THE COUNSEL FOR TEXAS
9 WRITES, "THESE MESSAGES ARE NOT RETAINED
10 IN ANY WAY UNLESS THEY ARE MARKED ON THE
11 RECORD BY THE USER." I WILL PAUSE. THAT'S
12 TRUE TOO, RIGHT, SIR?

13 A. YES.

14 Q. AND THEN COUNSEL WRITES, "IF
15 MARKED ON THE RECORD THEY ARE MAINTAINED
16 FOR 30 DAYS AND THEN DELETED." I'LL PAUSE
17 THERE.

18 AS WE DISCUSSED, IT WAS THEY
19 WERE ACTUALLY RETAINED FOR AT LEAST 30
20 DAYS, SOMETIMES MORE, BUT THEN DELETED
21 DEPENDING ON WHAT KIND OF CHAT IT WAS,
22 RIGHT, SIR?

23 A. YES.

24 Q. FOR EXAMPLE, FOR ONE-ON-ONE --
25 FOR A ONE-ON-ONE CHAT THAT WAS ON THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 308

1 RECORD THAT WOULD BE DELETED AFTER 30
2 DAYS, RIGHT?

3 A. YES.

4 Q. BUT IF IT WAS, FOR EXAMPLE, A
5 ROOM, THE DELETION -- THE RETENTION
6 POLICY FOR "ON THE RECORD" CHATS WAS
7 LONGER, TRUE?

8 A. YES. TRUE.

9 Q. SO LET ME KEEP RECORDING WHAT
10 COUNSEL FOR TEXAS WROTE, "IF THE USER IS
11 ON A LEGAL HOLD THE USER IS TOLD TO MARK
12 ALL CHATS AS 'ON THE RECORD'. IF THE USER
13 DOES NOT TAKE THIS ACTION FOR EVERY
14 CONVERSATION" -- SORRY. LET ME PAUSE
15 THERE.

16 THE INSTRUCTION TO THE USER TO
17 MARK ALL CHATS "ON THE RECORD" IF THEY'RE
18 ON HOLD, THAT WAS TRUE, RIGHT, THAT WAS
19 ACCURATE?

20 A. IF THE USER HAS RECEIVED A
21 LEGAL HOLD, YES.

22 Q. IF THE USER DOES NOT TAKE THIS
23 ACTION FOR EVERY CONVERSATION THE
24 UNMARKED ONES WILL BE DELETED
25 IMMEDIATELY. AND SIR, WAS THAT TRUE?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 309

1 A. THAT'S NOT ACCURATE BECAUSE
2 IT'S TALKING ABOUT CONVERSATIONS.

3 Q. WELL, IS IT POSSIBLE THAT THE
4 AUTHOR HERE WHEN THEY SAID "CONVERSATION"
5 MEANT "MESSAGE"?

6 A. IT'S POSSIBLE.

7 MR. RENARD: OBJECTION TO
8 FORM.

9 Q. AND THEN THEY WROTE, "IF A
10 PERSON ON LEGAL HOLD MARKS THE CHATS AS
11 ON THE RECORD, THE MARKED RECORDS ARE
12 RETAINED INDEFINITELY." AND THAT IS TRUE
13 FOR CHAT MESSAGES, RIGHT, SIR?

14 A. AGAIN, IT'S NOT CLEAR IF THERE
15 WAS -- IF BOTH SIDES WERE ON THE SAME
16 PAGE WHETHER THEY'RE TALKING ABOUT CHATS
17 OR CONVERSATIONS. BUT AS I MENTIONED
18 EARLIER WITH CONVERSATIONS, IT IS
19 POSSIBLE FOR SOMEONE ELSE IN THE CHAT TO
20 TURN OFF -- TURN THE RECORD -- TURN
21 "HISTORY OFF" AND FOR DOCUMENTS TO BE
22 LOST IN THAT SITUATION.

23 Q. OKAY. WELL, IN ANY EVENT, THIS
24 LETTER WAS DATED FEBRUARY 4TH, AND THEN
25 AFTER THIS LETTER CAME EXHIBIT 18 WHERE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 310

1 GOOGLE MADE SOME CLARIFICATIONS AND WE
2 WENT THROUGH EACH OF THOSE STATEMENTS
3 ALREADY. DO YOU RECALL THAT?

4 A. OKAY. YES.

5 Q. ARE YOU AWARE THAT THIS CASE
6 WHEN IT WAS -- ONCE IT WAS FILED WAS
7 CONSOLIDATED WITH OTHER CASES AS PART OF
8 SOME MULTIDISTRICT LITIGATION IN NEW
9 YORK?

10 A. I AM AWARE OF THAT.

11 Q. AND ARE YOU AWARE THAT AS A
12 PART OF THAT CONSOLIDATED LITIGATION THE
13 PARTIES DID CONFER PURSUANT TO RULE
14 26(F)?

15 A. I -- IF YOU SAY SO.

16 Q. WELL, SO MAYBE THAT ANSWERS MY
17 NEXT QUESTION.

18 DO YOU KNOW ANYTHING ABOUT THE
19 DETAILS INCLUDING THE LENGTH OR THE
20 SUBSTANCE OF THOSE RULE 26(F)
21 NEGOTIATIONS ON AN ESI ORDER?

22 A. THE OPINIONS I PROVIDE IN MY
23 REPORT DIDN'T -- WERE NOT -- WERE BASED
24 UPON MR. MALKIEWICZ'S OPINIONS AND NOT --
25 YOU KNOW, I DIDN'T OPINE ON THE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 311

1 MEET-AND-CONFER CONFERENCES, SO I'M NOT
2 AWARE OF THOSE DISCUSSIONS.

3 Q. SO I TAKE IT YOU DON'T KNOW
4 WHAT THE ESI ORDER, LIKE THE FINAL ONE
5 ENTERED INTO CONNECTION WITH THIS CASE,
6 DO YOU KNOW WHAT THAT SAID IN TERMS OF
7 PARTIES CONTINUING OR DISRUPTING THEIR
8 THEN CURRENT RETENTION PRACTICES?

9 A. I DON'T BELIEVE I -- I
10 REFERENCE IN MY RELIED UPON -- I DON'T
11 RECALL SEEING THE ESI ORDER.

12 Q. WAS IT GIVEN TO YOU AS PART OF
13 THE UNIVERSE OF MATERIALS AVAILABLE THAT
14 YOU PUT IN APPENDIX C?

15 A. I BELIEVE SO.

16 Q. YOU DIDN'T THINK IT WAS
17 IMPORTANT TO YOU TO READ THE ESI ORDER
18 THE PARTIES AGREED TO BEFORE OPINING THAT
19 MY CLIENT FAILED TO PRESERVE EVIDENCE
20 WITH AN INTENT TO DEPRIVE THE OTHER SIDE
21 OF EVIDENCE?

22 MR. RENARD: OBJECTION TO
23 FORM.

24 A. I DON'T SEE HOW THAT WOULD
25 AFFECT WHAT THE ACTIONS THAT WERE TAKEN

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 312

1 WITH REGARD TO THE PRESERVATION OF CHATS.

2 Q. IT WOULDN'T AFFECT THE
3 PROPRIETY OF THAT RETENTION AFTER THE
4 DATE OF THE ORDER IF THE ORDER SAYS, HEY,
5 WHATEVER YOU GOT GOING ON NOW, LEAVE IT?

6 MR. RENARD: OBJECTION TO
7 FORM.

8 A. IN MY EXPERIENCE THE ESI
9 PROTOCOLS ARE CREATED AND FOCUS ON
10 PRODUCTION IN THE CASE, ESI PRODUCTIONS.
11 YOU KNOW, I'M NOT AWARE OF LANGUAGE THAT
12 WOULD HAVE AFFECTED THE OBLIGATION TO
13 PRESERVE DATA.

14 Q. SAY THAT LAST PART. SORRY.
15 I'LL READ IT.

16 A. I DON'T BELIEVE THERE WOULD BE
17 LANGUAGE THAT WOULD AFFECT THE DUTY OF
18 THE OBLIGATION TO PRESERVE DATA.

19 Q. IS IT YOUR UNDERSTANDING IN
20 THIS CASE THAT THE STATES HAVE AN EQUAL
21 OR UNEQUAL ESI PRODUCTION
22 RESPONSIBILITY --

23 MR. RENARD: OBJECTION TO
24 FORM.

25 Q. -- AS GOOGLE? SORRY.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 313

1 A. CAN YOU REPHRASE WHAT YOU MEAN
2 BY THAT?

3 Q. IN CERTAIN LITIGATIONS YOU
4 HAVE A PLAINTIFF AND A DEFENDANT ON --
5 WHO HAVE A DIFFERENT AMOUNT OF
6 POTENTIALLY RELEVANT ESI; IS THAT
7 ACCURATE?

8 A. YES.

9 Q. IS THIS ONE OF THOSE CASES
10 WHERE THE PLAINTIFFS HAVE, IN YOUR VIEW,
11 AN UNEQUAL ESI PRODUCTION RESPONSIBILITY?

12 MR. RENARD: OBJECTION TO
13 FORM.

14 A. I CAN'T ANSWER WITH THE
15 LANGUAGE YOU USED. I WOULD SAY IT'S MY
16 UNDERSTANDING THE PRODUCTIONS IN THIS
17 CASE THAT GOOGLE HAS PRODUCED MORE
18 DOCUMENTS THAN THE PLAINTIFFS.

19 Q. SO IT'S POSSIBLE THAT THE
20 RESPONSIBILITIES TO PRODUCE ESI WERE
21 EQUAL, JUST GOOGLE PRODUCED MORE; IS THAT
22 WHAT YOU'RE SAYING?

23 MR. RENARD: OBJECTION TO
24 FORM.

25 A. AGAIN, MY OPINIONS DON'T

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 314

1 INVOLVE THE DOCUMENT REQUESTS AND DATA,
2 YOU KNOW, WITH REGARD TO THE REQUESTS FOR
3 PRODUCTION IN THE CASE, SO I DON'T
4 BELIEVE I CAN ANSWER THAT QUESTION.

5 Q. WHO IS SUING WHO?

6 A. THE PLAINTIFFS ARE SUING
7 GOOGLE.

8 Q. FOR WHAT?

9 A. FOR -- I DON'T HAVE -- I'D
10 HAVE TO -- FOR COMPETITION ISSUES,
11 DECEPTIVE PRACTICES AND, AGAIN, I DON'T
12 HAVE THE COMPLAINT IN FRONT OF ME.

13 Q. YOU WOULD NEED THE COMPLAINT
14 TO ANSWER MORE FULLY THE QUESTION OF WHAT
15 THE CASE IS ABOUT, TRUE?

16 A. I MEAN THE CASE IS ABOUT THE
17 USE OF THE VARIOUS MECHANISMS BY WHICH
18 PUBLISHERS WERE -- LET ME RESTART.

19 THE CASE INVOLVES SEVERAL
20 MANNERS IN WHICH GOOGLE USED DIFFERENT --
21 IT WAS ACCUSED OF TAKING STEPS TO
22 IMPROPERLY SET UP AUCTIONS FOR DIGITAL
23 ADVERTISING.

24 Q. OKAY. AND IN A CASE LIKE THE
25 ONE YOU DESCRIBE, ARE THE STATES BRINGING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 315

1 THE LAWSUIT GOING TO HAVE ANYWHERE NEAR
2 AN EQUAL AMOUNT OF ESI THAT THEY NEED TO
3 PRODUCE?

4 A. NO.

5 Q. SO CAN WE CALL IT UNEQUAL IN A
6 CASE LIKE THIS?

7 A. YES.

8 Q. IS IT YOUR EXPERIENCE THAT
9 WHEN THE REQUESTING PARTY HAS UNEQUAL ESI
10 PRODUCTION RESPONSIBILITIES THEY CAN
11 ATTEMPT TO TURN THE EDISCOVERY PROCESS
12 INTO A CHANCE TO PAINT THE ADVERSARY IN A
13 BAD LIGHT BEFORE MERITS ARE EVEN ON THE
14 TABLE FOR THE COURT?

15 MR. RENARD: OBJECTION TO
16 FORM.

17 A. THAT CAN HAPPEN.

18 Q. IN FACT, THE REQUESTING PARTY
19 MAY MAKE CLAIMS OF SPOILIATION ALL FOR THE
20 PURPOSE OF GAINING AN UPPER HAND BEFORE
21 THE COURT, RIGHT?

22 MR. RENARD: SAME OBJECTION.

23 A. THAT CAN HAPPEN.

24 Q. ONE WAY TO AVOID THAT IS TO
25 FULLY DISCLOSE YOUR ESI RETENTION ISSUES

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 316

1 OF THE RULE 26 CONFERENCE, RIGHT, SIR?

2 A. YES. BUT, AGAIN, I DON'T
3 BELIEVE THAT WAS THE CASE IN THIS
4 LITIGATION.

5 MS. NAJAM: OKAY. I'LL OBJECT
6 AS NONRESPONSIVE TO EVERYTHING
7 AFTER THE "YES".

8 Q. AT ANY POINT BEFORE THIS YEAR
9 ARE YOU AWARE OF THE STATES IN THIS CASE
10 OBJECTING TO GOOGLE'S DISCLOSED RETENTION
11 POLICY FOR CHATS?

12 MR. RENARD: OBJECTION, FORM.

13 A. PRIOR TO THIS YEAR? I CAN'T
14 RECALL THE EXACT DATE THAT IT WAS RAISED.
15 I'M NOT SURE IF IT WAS LAST YEAR OR THIS
16 YEAR.

17 Q. IN TERMS OF WHEN ISSUES
18 PERTAINING TO EDISCOVERY AREN'T RAISED AT
19 THE 26(F) CONFERENCE, THAT CAN LEAD TO
20 PERMANENT CONSEQUENCES IN THE LITIGATION,
21 RIGHT?

22 A. YES.

23 Q. IN FACT, COURTS HAVE HELD THAT
24 A FAILURE TO RAISE ISSUES DURING THE RULE
25 26(F) CONFERENCE FORECLOSES A PARTY FROM

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 317

1 LATER RAISING ISSUES OF THE INADEQUATE
2 PRODUCTION OF ELECTRONIC INFORMATION,
3 TRUE?

4 A. IN CERTAIN CASES THAT'S TRUE.

5 Q. ALL RIGHT. I HAVE A COUPLE OF
6 THINGS THAT I WANTED TO ASK YOU ABOUT
7 FROM YOUR REPORT. WE'LL START WITH PAGE
8 21.

9 MS. NAJAM: WHILE YOU'RE
10 TURNING TO THAT, CAN I PLEASE GET A
11 TIME CHECK, GOOD SIR?

12 VIDEOGRAPHER: WE ARE 6:37 IN.

13 MS. NAJAM: THANK YOU.

14 Q. ARE YOU ON PAGE 21?

15 A. I AM.

16 Q. I WANT TO LOOK AT THE HEADING
17 ROMAN NUMERAL VIII.

18 A. I DON'T THINK THAT'S 21.

19 Q. I'M SORRY ROMAN NUMERAL VIII.
20 I'M BAD AT ROMAN NUMERALS.

21 YOU ARE TALKING ABOUT AN
22 ALLEGED OPINION BY MR. MALKIEWICZ THAT
23 GOOGLE EMPLOYEES DID NOT USE GOOGLE CHATS
24 FOR BUSINESS-RELATED COMMUNICATIONS. DO
25 YOU SEE WHERE I AM?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 318

1 A. YES.

2 Q. SIR, MR. MALKIEWICZ DIDN'T SAY
3 THAT, DID HE?

4 LET'S DO IT THIS WAY -- SORRY.
5 DO YOU HAVE AN ANSWER?

6 A. YES. THAT OPINION WAS A
7 PREDICATE TO HIS STATEMENT IN 10.J.

8 Q. OKAY.

9 A. CONSIDERING --

10 Q. SORRY. GO AHEAD.

11 A. CONSIDERING PROFESSOR
12 HOCHSTETLER'S DISREGARD OF KEY EVIDENCE,
13 I CONSIDER HIS CHARACTERIZATION OF THE
14 CHAT TOOL AS BEING USED INTERNALLY
15 THROUGHOUT GOOGLE FOR BUSINESS-RELATED
16 COMMUNICATION TO BE MISLEADING OR AT BEST
17 CRITICALLY INCOMPLETE.

18 Q. DID MR. MALKIEWICZ EVER COME
19 OUT AND OPINE IN HIS REPORT THAT GOOGLE
20 EMPLOYEES DIDN'T USE CHATS FOR
21 BUSINESS-RELATED COMMUNICATIONS?

22 A. AGAIN, HE DID NOT USE THAT
23 EXACT LANGUAGE BUT THAT OPINION IS -- IS
24 PART OF BEHIND THE OPINIONS THAT HE --
25 THAT IS A PART OF THE OPINIONS THAT HE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 319

1 PROVIDED IN HIS REPORT.

2 Q. THAT'S SOMETHING THAT YOU HAVE
3 GLEANED THAT IS YOUR VIEW; IS THAT TRUE?

4 A. NO. THAT'S WHAT IT SAYS.
5 THAT'S WHAT IT READS.

6 Q. SORRY. WHERE ARE YOU READING
7 FROM? ARE YOU GOING BACK TO PARAGRAPH J
8 AGAIN?

9 A. IF YOU GIVE ME A SECOND.

10 Q. A-HUM.

11 A. I MEAN THE REFERENCE, AGAIN,
12 YOU KNOW, IN PARAGRAPH 98 I STATE THAT,
13 YOU KNOW, AGAIN, HIS CHARACTERIZATION OF
14 GOOGLE CHAT, YOU KNOW, HE CLAIMS THAT
15 IT'S BEING USED INTERNALLY FOR
16 BUSINESS-RELATED COMMUNICATIONS IS
17 MISLEADING AND AT BEST CRITICALLY
18 INCOMPLETE. AND MY OPINION IS THE
19 EVIDENCE CLEARLY REFUTES THE STATEMENT.

20 Q. YEAH, I KNOW YOUR OPINION. I
21 WAS ORIGINALLY ASKING IF YOU CAN POINT ME
22 TO ANYWHERE IN HIS REPORT WHERE HE
23 ACTUALLY OPINES THAT GOOGLE EMPLOYEES
24 DIDN'T USE CHAT FOR SUBSTANTIVE
25 COMMUNICATIONS BESIDES 10.J WHICH YOU

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 320

1 HAVE CITED.

2 ARE YOU ABLE TO POINT ME TO
3 ANYTHING ELSE?

4 IT'S BEEN THREE MINUTE, SO I'D
5 LIKE TO MOVE ON IF THE ANSWER IS NO.

6 MR. RENARD: OBJECTION TO THE
7 FORM OF THE QUESTION.

8 A. MY OPINION IN 99 -- IN
9 PARAGRAPH 99 IS THAT HE WAS MISLEADING,
10 HIS STATEMENT THAT GOOGLE CHAT IS USED
11 INTERNALLY FOR -- IS -- THAT HIS
12 STATEMENT THAT DR. -- PROFESSOR
13 HOCHSTETLER'S -- HIS STATEMENT THAT
14 PROFESSOR HOCHSTETLER WAS INCORRECT WHEN
15 HE SAID GOOGLE CHAT WAS USED INTERNALLY
16 THROUGHOUT GOOGLE FOR BUSINESS-RELATED
17 COMMUNICATION IS MISLEADING OR AT BEST
18 CRITICALLY INCOMPLETE WAS -- WAS --
19 THAT'S THE OPINION THAT I DISAGREE WITH
20 AND IT'S STATED IN MY REPORT.

21 MS. NAJAM: OKAY. I'LL OBJECT
22 AS NONRESPONSIVE AND MOVE ON.

23 Q. LET'S GO TO PAGE 31, PARAGRAPH
24 102. IT'S THE RIGHT PARAGRAPH, 102.

25 YOU HAVE AN OPINION THERE THAT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 321

1 -- SECOND SENTENCE, "IT IS LIKELY THAT
2 THOSE 5% OF CHATS ARE POTENTIALLY VERY
3 RESPONSIVE OR KEY DOCUMENTS." DO YOU SEE
4 THAT? DO YOU SEE WHERE I READ FROM?

5 A. YES.

6 Q. THAT 5%, THAT'S A REFERENCE TO
7 THE CALCULATED NUMBER OF PRODUCED CHATS
8 FROM THE FIVE CUSTODIANS CONTAINED IN
9 THAT META LOG SET, IN OTHER WORDS 5% OF
10 THE MESSAGES THAT WERE FORCED -- SENT
11 AFTER FEBRUARY 8 WHERE HISTORY WAS FORCED
12 ON, 5% WERE RESPONSIVE, RIGHT? THAT'S
13 WHAT MR. MALKIEWICZ HAD DETERMINED?

14 A. YES, APPROXIMATELY.

15 Q. SO IN TERMS OF YOUR OPINION
16 THAT IT'S LIKELY THAT THAT CLUMP OF CHATS
17 ARE POTENTIALLY VERY RESPONSIVE OR KEY
18 DOCS, DID YOU ACTUALLY REVIEW EACH ONE OF
19 THEM?

20 A. I CANNOT REVIEW EACH ONE OF
21 THEM.

22 Q. DID YOU REVIEW ANY OF THESE
23 DOCUMENTS, THAT IS, THE PRESERVED CHATS
24 FROM WITHIN THAT LOG DATA PERIOD THAT
25 WERE PRODUCED FROM THOSE FIVE CUSTODIANS?

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 322

1 A. I BELIEVE I READ SOME OF THEM,
2 BUT I STATE HERE IT'S LIKELY. YOU KNOW, I
3 DON'T -- MY -- MY OPINION IS BASED UPON
4 THE FACT THAT, YOU KNOW, I THINK THAT'S A
5 PRETTY HIGH PERCENTAGE OF RESPONSIVENESS
6 FOR -- FOR CHATS AND BASED UPON MY REVIEW
7 OF ALL THE CHATS IN THIS CASE, A LARGE
8 NUMBER THAT DO HIT ON SEARCH TERMS ARE
9 RESPONSIVE OR VERY RESPONSIVE.

10 MS. NAJAM: I'LL OBJECT AS
11 NONRESPONSIVE.

12 Q. MY QUESTION, AGAIN, DID YOU
13 ACTUALLY LAY YOUR EYES ON ANY OF THAT 5%
14 GROUP? THAT IS, CHATS FROM THE FIVE
15 CUSTODIANS WHOSE METADATA PROFESSOR
16 HOCHSTETLER LOOKED AT THAT WERE PRODUCED
17 IN THAT PERIOD FEBRUARY 8TH UNTIL THE END
18 OF FEBRUARY 2023?

19 A. I BELIEVE THAT I DID.

20 Q. WELL, WERE ANY OF THEM VERY
21 RESPONSIVE OR KEY?

22 A. I DON'T RECALL.

23 Q. YOU DON'T CITE ANY HERE IN
24 PARAGRAPH 102, DO YOU?

25 A. NO. MY OPINION HERE --

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 323

1 Q. I'M GOING TO MOVE ON.

2 A. OKAY.

3 Q. I UNDERSTAND YOUR OPINION. I'M
4 SORRY TO CUT YOU OFF. I ONLY HAVE A FEW
5 MINUTES LEFT.

6 A. TAKE YOUR TIME.

7 Q. OKAY. ON PAGE 36 OF YOUR
8 REPORT THERE IS A HEADING FOR ROMAN
9 NUMERAL XVIII, CITING A SUPPOSED OPINION
10 FROM MR. MALKIEWICZ THAT, "ANY MESSAGES
11 SENT BY CUSTODIANS THAT WERE NOT PRODUCED
12 ARE NOT RELEVANT AND ANY TIME A CUSTODIAN
13 TURNED 'HISTORY OFF' MEANT THAT CHAT WAS
14 NOT RELEVANT AND, THUS, 'HISTORY OFF' HAD
15 NO IMPACT ON CHAT RETENTION", AND THEN
16 YOU SAY IT'S INCORRECT. DO YOU SEE WHERE
17 I AM?

18 A. I DO.

19 Q. SIR, IS IT YOUR TESTIMONY
20 UNDER OATH THAT THOSE ARE REALLY THREE
21 OPINIONS THAT MR. MALKIEWICZ OFFERED IN
22 HIS REPORT?

23 MR. RENARD: OBJECTION TO
24 FORM.

25 A. I BELIEVE THEY'RE ALL

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 324

1 CONNECTED .

2 Q. LET'S TAKE -- I WANT TO FOCUS
3 ON NUMBER 2 AND NUMBER 3 .

4 CAN YOU TELL ME WHERE MR.
5 MALKIEWICZ SAID IN HIS REPORT THAT ANY
6 TIME A CUSTODIAN TURNED "HISTORY OFF" ,
7 THAT MEANT THE CHAT WAS NOT RELEVANT?

8 LET'S DO THIS MORE QUICKLY. IN
9 YOUR FOOTNOTE 97 YOU CITE CERTAIN
10 PARAGRAPHS OF HIS REPORT. DO YOU SEE
11 THAT?

12 A. I DO .

13 Q. ARE THOSE THE SOURCES OF HIS
14 PURPORTED OPINIONS THAT YOU ARE REBUTTING
15 IN THIS SECTION?

16 A. THOSE ARE SOME OF THE
17 PARAGRAPHS WHERE I BELIEVE THESE
18 STATEMENTS WERE EITHER LISTED THAT WERE
19 PREDICATED. BUT, AGAIN, THESE
20 STATEMENTS, YOU KNOW, THIS WAS PART OF
21 HIS REPORT AND HIS CONCLUSIONS THAT
22 "HISTORY OFF" , THESE POINTS THAT I
23 MENTION HERE AND, YOU KNOW, I BELIEVE
24 THOSE OPINIONS WERE INCORRECT.

25 Q. SIR, DID MR. MALKIEWICZ EVER

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 325

1 SAY IN HIS REPORT THAT IF A CUSTODIAN
2 SENT AN "OFF THE RECORD" CHAT, IT MUST
3 NOT HAVE BEEN RELEVANT? DID HE REALLY SAY
4 THAT?

5 A. I MEAN, AGAIN, THESE ARE NOT
6 QUOTES BUT HE SAID VERY SIMILAR
7 STATEMENTS OR, YOU KNOW, THESE STATEMENTS
8 WERE PART OF THE CONCLUSIONS HE CAME TO.
9 IN FACT, IN 87, WHICH IS ONE OF THE
10 PARAGRAPHS THAT I CITE HE STATES, "THE
11 MORE PLAUSIBLE EXPLANATION FOR THE FACT
12 THAT HISTORY IS SWITCHED OFF IS THAT THE
13 NATURE OF THE DISCUSSION DID NOT PERTAIN
14 TO MATTERS RELEVANT TO THIS LITIGATION."

15 Q. THAT'S 87, YOU SAID?

16 A. YES.

17 Q. THAT IS AN OPINION SPECIFIC TO
18 A PARTICULAR CONVERSATION IN A GROUP ID
19 WITH [REDACTED], RIGHT?

20 A. I MEAN, IT'S A CONCLUSION OF
21 HIS. IT DOESN'T LIMIT ITSELF TO ONE ITEM.
22 IT'S A BROAD STATEMENT REGARDING THE
23 HISTORY OF BEING SWITCHED OFF AND THAT'S
24 HOW A LOT OF HIS STATEMENTS WERE A LITTLE
25 -- WERE PRETTY BROAD IN WHAT HE WAS

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 326

1 ASSERTING .

2 Q . OKAY . SO YOU TOOK PARAGRAPH 87
3 OF HIS REPORT TO BE A GENERALIZED
4 STATEMENT ABOUT JUST WHEN FOLKS TURN
5 "HISTORY OFF" THAT MEANS THEY'RE TALKING
6 ABOUT IRRELEVANT MATTERS?

7 A . YES .

8 Q . OKAY . DID YOU FOR THIS CASE
9 REVIEW ANY OF THE PLAINTIFF STATES ESI
10 RETENTION POLICIES?

11 A . YES , I REVIEWED THE ONES CITED
12 TO IN MR . MALKIEWICZ 'S REPORT .

13 Q . CAN YOU CITE ANY EXEMPTIONS
14 UNDER -- FIRST WE'RE GOING TO START WITH
15 THE LAW . ANY LEGAL EXEMPTIONS FOR WHEN A
16 PARTY TO A LAWSUIT IS A STATE ENTITY
17 ANTICIPATING IT'S GOING TO FILE A
18 LAWSUIT?

19 MR . RENARD : OBJECTION TO
20 FORM .

21 A . CAN YOU REPHRASE WHAT YOU'RE
22 ASKING?

23 Q . SURE . I SHOULD BE MORE
24 SPECIFIC . IN TERMS OF THE STANDARDS OF
25 ESI PRESERVATION -- THIS IS A DIFFERENT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 327

1 QUESTION -- IS THERE ANY EXCEPTION TO
2 WHAT YOU CONSIDER INDUSTRY STANDARD FOR
3 WHEN THE PARTY ANTICIPATING A SUIT IS A
4 STATE ENTITY AS OPPOSED TO A PRIVATE
5 ENTITY?

6 A. I WOULDN'T SAY THERE IS AN
7 EXEMPTION, NO.

8 Q. ARE THERE A DIFFERENT SET OF
9 RULES FOR WHEN THE PARTY ANTICIPATING
10 LITIGATION IS A GOVERNMENTAL UNIT IN
11 TERMS OF PRESERVING ESI?

12 A. NO. BUT, YOU KNOW, I THINK
13 WITH ANY PRESERVATION IT DEPENDS WHERE
14 THE RESPONSIVE DOCUMENTS, COMMUNICATION
15 ARE MAINTAINED.

16 MS. NAJAM: OKAY. ALL RIGHT.
17 I WILL PASS THE WITNESS. THAT MEANS
18 I AM DONE WITH THE MAIN PART BUT I
19 MAY OR MAY NOT TALK TO YOU SOON.
20 THANK YOU VERY MUCH.

21 YOU GUYS WANT TO TAKE A BREAK?

22 MR. RENARD: WHY DON'T WE.

23 VIDEOGRAPHER: TIME IS 5:55

24 P.M. WE ARE GOING OFF THE RECORD.

25 (RECESS IS TAKEN.)

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 328

1 VIDEOPHOTOGRAPHER: THE TIME IS
2 APPROXIMATELY 6:04 P.M. WE ARE
3 BACK ON THE RECORD.

4 CROSS-EXAMINATION BY MR. RENARD:

5 Q. MR. GRANDE, I JUST HAVE
6 HOPEFULLY A FEW MINUTES OF QUESTIONS FOR
7 YOU.

8 YOU RECALL YOU'VE BEEN ASKED
9 THROUGHOUT YOUR DEPOSITION A NUMBER OF
10 QUESTIONS REGARDING EXHIBIT 1, WHICH IS
11 YOUR REBUTTAL EXPERT REPORT DATED
12 DECEMBER 11, 2024, CORRECT?

13 A. YES.

14 Q. AND YOU'VE ALSO BEEN ASKED
15 SOME QUESTIONS WITH RESPECT TO YOUR
16 DECLARATION WHICH IS EXHIBIT 9 DATED
17 DECEMBER 9 OF 2024, CORRECT?

18 A. YES.

19 Q. WAS ANY OF YOUR TESTIMONY
20 TODAY INTENDED TO CHANGE THE OPINIONS
21 EXPRESSED IN YOUR DECEMBER 9 DECLARATION?

22 A. NO.

23 Q. WAS ANY OF YOUR TESTIMONY
24 TODAY INTENDED TO CHANGE THE OPINIONS OR
25 ANY OF THE OPINIONS EXPRESSED IN YOUR

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 329

1 REBUTTAL REPORT, EXHIBIT 1?

2 A. NO.

3 Q. ARE ALL OF YOUR OPINIONS IN
4 YOUR DECLARATION AND IN YOUR REBUTTAL
5 REPORT FORMED USING YOUR EXPERTISE AS AN
6 EDISCOVERY EXPERT?

7 A. YES.

8 Q. DID YOU INTEND TO ISSUE OR
9 EXPRESS ANY LEGAL CONCLUSIONS THAT ARE
10 WITHIN THE PROVENANCE OF THE COURT?

11 MS. NAJAM: OBJECTION, FORM.

12 A. I DID NOT INTEND TO PROVIDE
13 AND DID NOT PROVIDE ANY LEGAL OPINIONS.

14 Q. CAN YOU TELL US WHETHER OR NOT
15 YOU BELIEVE THAT YOU HAD SUFFICIENT FACTS
16 AND DATA ON WHICH TO FORM AND EXPRESS THE
17 CONCLUSIONS SET FORTH IN YOUR DECLARATION
18 AND YOUR REPORT?

19 A. YES, I BELIEVE I DID.

20 Q. DO YOU RECALL SOME QUESTIONS
21 BEING ASKED TODAY WITH RESPECT TO THE
22 METHODOLOGY THAT YOU EMPLOYED IN FORMING
23 YOUR OPINIONS?

24 A. YES.

25 Q. CAN YOU TELL US WHETHER OR NOT

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 330

1 THAT METHODOLOGY THAT YOU USED IN THIS
2 CASE WAS BASED ON RELIABLE AND GENERALLY
3 ACCEPTED PRINCIPLES?

4 MS. NAJAM: OBJECTION, FORM.

5 A. IT WAS.

6 Q. CAN THAT METHODOLOGY BE
7 TESTED?

8 A. IT CAN.

9 Q. DO YOU BELIEVE THAT YOU
10 RELIABLY APPLIED THAT METHODOLOGY TO FORM
11 YOUR OPINIONS?

12 A. YES, I DO.

13 Q. MR. GRANDE, DO YOU RECALL THE
14 QUESTIONS THAT YOU WERE ASKED TODAY ABOUT
15 THE 2008 MEMO FROM KENT WALKER MARKED AS
16 EXHIBIT 10?

17 A. I DO.

18 Q. CAN YOU PULL THAT OUT OR CAN
19 YOU FIND THAT? IT'S DIFFICULT TO KEEP
20 THOSE IN ORDER. HERE WE GO.

21 WHAT IS THE DATE OF THAT MEMO,
22 EXHIBIT 10?

23 A. SEPTEMBER 16, 2008.

24 Q. DOES THIS MEMO, IN YOUR
25 OPINION, SPEAK TO THE USE AND PREVALENCE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 331

1 OF INSTANT MESSAGING THAT IS CHATS AT
2 GOOGLE?

3 MS. NAJAM: OBJECTION, FORM.

4 Q. LET ME JUST ASK YOU, DOES
5 THAT, IN YOUR OPINION, REFLECT THE USE OF
6 CHATS WITHIN GOOGLE?

7 A. IT DOES. I WAS JUST LOOKING
8 FOR THE -- IT DOES STATE "WE'RE AN EMAIL
9 AND INSTANT MESSAGING CULTURE."

10 Q. DOES THE MEMO SPEAK TO WHETHER
11 GOOGLE WAS PRESERVING CHATS IN 2008?

12 A. ACCORDING TO THE MEMO, PRIOR
13 TO THIS DATE, THE CHATS WERE BEING
14 PRESERVED AS "ON THE RECORD". AND AS OF
15 THIS MEMO IT WAS DECIDED TO TAKE THEM OFF
16 THE RECORD, THE DEFAULT CORPORATE SETTING
17 FOR CHATS.

18 Q. SO WHAT DO YOU UNDERSTAND BY
19 VIRTUE OF EXHIBIT 10 WAS THE DEFAULT AS
20 OF SEPTEMBER 2008?

21 A. PRIOR TO THIS DATE, THAT IT
22 WAS -- "ON THE RECORD" WAS THE DEFAULT
23 SETTING.

24 Q. AND WHAT DOES THAT MEAN AGAIN?

25 A. THAT CHATS WERE KEPT FOR

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 332

1 LONGER THAN 24 HOURS .

2 Q. DOES THE MEMO ADDRESS IN ANY
3 WAY AND STATE THAT GOOGLE STOPPED SAVING
4 CHATS BECAUSE IT WAS TOO BURDENSOME TO
5 STORE THAT DATA?

6 LET ME JUST ASK , DID THE MEMO
7 SAY ANYWHERE THAT GOOGLE STOPS SAVING
8 CHATS BECAUSE IT WAS TOO BURDENSOME TO DO
9 SO?

10 A. I DON'T BELIEVE SO .

11 Q. AS AN EXPERT IN EDISCOVERY , DO
12 YOU HAVE AN OPINION AS TO WHY GOOGLE
13 STOPPED PRESERVING GOOGLE CHATS?

14 MR. RENARD: OBJECTION , FORM .

15 A. YES . BASED ON THIS MEMO , I
16 BELIEVE GOOGLE STOPPED MAINTAINING OR
17 STOPPED KEEPING CHATS ON THE RECORD , AS
18 IT STATES , BECAUSE THEY WERE IN THE MIDST
19 OF SEVERAL SIGNIFICANT LEGAL AND
20 REGULATORY MATTERS .

21 Q. DO YOU RECALL QUESTIONS THAT
22 YOU WERE ASKED ABOUT THE REDACTED
23 LITIGATION HOLD LETTERS?

24 A. YES .

25 Q. DO YOU HAVE AN UNDERSTANDING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 333

1 THAT OR WHETHER INDIVIDUAL CHAT MESSAGES
2 ARE PART OF WHAT'S KNOWN AS "A GREATER
3 CHAT CONVERSATION" ?

4 A. YES.

5 Q. IF A GOOGLE EMPLOYEE HAD NOT
6 BEEN INSTRUCTED SPECIFICALLY TO SAVE
7 "HISTORY OFF" CHATS, IS IT YOUR OPINION
8 THAT THOSE CHAT CONVERSATIONS WOULD OR
9 WOULD NOT BE CONSIDERED COMPLETE AND
10 ACCURATE?

11 MS. NAJAM: OBJECTION TO THE
12 FORM.

13 A. IF AN EMPLOYEE HAD NOT BEEN
14 DIRECTED TO SAVE "HISTORY OFF" CHATS --

15 Q. -- WOULD THE CONVERSATIONS OF
16 WHICH THOSE INDIVIDUAL CHATS WERE APART
17 BE COMPLETE AND ACCURATE, IN YOUR
18 OPINION?

19 A. NO. AGAIN, AS I DISCUSSED
20 EARLIER, IF ONE PARTY TURNS "HISTORY OFF"
21 YOU ARE GOING TO LOSE PARTS OF THAT
22 CONVERSATION AND YOU MAY HAVE SOME
23 MESSAGES AND NOT OTHER MESSAGES AND, YOU
24 KNOW, THE WAY I DESCRIBED IT IS SWISS
25 CHEESE WHERE SOME MESSAGES WOULD BE

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 334

1 PRESERVED AND OTHERS WOULD NOT.

2 MS. NAJAM: STRIKE AS
3 NONRESPONSIVE.

4 Q. AND IN LIGHT OF THAT
5 OBJECTION, WHAT DID YOU MEAN IN YOUR
6 TESTIMONY BY SWISS CHEESE?

7 A. SURE. THAT WITHIN A CHAT
8 CONVERSATION EVEN IF ONE INDIVIDUAL IS
9 INTENDING TO HAVE "HISTORY ON" AND
10 PRESERVE COMMUNICATIONS, THEY DON'T HAVE
11 THE CAPABILITY TO PRESERVE THAT ENTIRE
12 CONVERSATION IF ANOTHER INDIVIDUAL TURNS
13 THE "HISTORY OFF" ON THEIR END PRIOR TO
14 SENDING THE MESSAGE, AND FOR OTHER
15 FACTORS AS WELL.

16 IN ADDITION, AS MR. MALKIEWICZ
17 STATED IN HIS DEPOSITION, THE "HISTORY
18 ON" SETTING CAN GO OFF AFTER 24 HOURS AS
19 WELL. SO, YOU KNOW, WHEN I SAY SWISS
20 CHEESE, IT'S A VERY -- YOU KNOW, AND
21 WE'VE SEEN CHATS WHERE THERE ARE --
22 APPEAR TO BE BREAKS IN THE MIDDLE AND
23 THEY'RE NOT COMPLETE CHAT CONVERSATIONS.
24 EXCUSE ME.

25 Q. DO YOU RECALL QUESTIONS BEING

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 335

1 ASKED OF YOU TODAY ABOUT PRESERVED CHATS?

2 A. YES.

3 Q. DO YOU OFFER ANY OPINIONS IN
4 YOUR REBUTTAL REPORT AS TO SUBSTANTIVE
5 CHAT CONVERSATIONS IN THE CHATS THAT ARE
6 THEORETICALLY PRESERVED BUT NOT PRODUCED?

7 MS. NAJAM: OBJECTION, FORM.

8 A. CAN YOU REPEAT THAT?

9 Q. SURE. DO YOU OFFER OPINIONS IN
10 YOUR REBUTTAL REPORT AS TO SUBSTANTIVE
11 CHAT CONVERSATIONS AND THE CHATS THAT ARE
12 THEORETICALLY PRESERVED BUT NOT PRODUCED?

13 MS. NAJAM: OBJECTION, FORM.

14 Q. LET ME JUST GO ON.

15 A. YEAH.

16 Q. IS IT YOUR OPINION THAT GIVEN
17 WHAT YOU'VE OBSERVED AND SPOKEN ABOUT IN
18 YOUR REPORT THAT THERE ARE CONVERSATIONS
19 THAT CONTAIN MISSING INDIVIDUAL MESSAGES?

20 A. YES.

21 Q. I WANT TO JUST TURN GENERALLY
22 TO YOUR OPINIONS THAT YOU EXPRESS IN YOUR
23 REPORT. AND SIR, WOULD IT BE FAIR TO SAY
24 THAT THOSE ARE CITED AND SUMMARIZED ON
25 PAGES 2 AND 3 IN THE TABLE OF CONTENTS OF

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 336

1 YOUR REPORT, WHICH IS EXHIBIT 1?

2 A. THAT'S FAIR.

3 Q. IN RESPONSE TO A COUPLE OF
4 COUNSEL'S QUESTIONS YOU TALKED ABOUT
5 PREDICATES TO MR. MALKIEWICZ'S OPINIONS.
6 WHAT DID YOU MEAN BY THAT?

7 A. I MEANT THAT MR. MALKIEWICZ'S
8 REBUTTAL REPORT HAS A NUMBER OF
9 STATEMENTS AND THAT SOME OF HIS OPINIONS
10 THAT ARE STATED WERE -- REQUIRED
11 PREDICATES OR WERE PART OF HIM MAKING THE
12 CONCLUSIONS THAT HE MADE AND, YOU KNOW,
13 WERE -- THESE ARE NOT QUOTES BUT THESE
14 ARE STATEMENTS. THESE ARE, YOU KNOW,
15 REQUIRED PREDICATES TO THE OPINIONS THAT
16 HE PROVIDED IN HIS REBUTTAL REPORT.

17 Q. CAN YOU TELL US WHETHER OR NOT
18 ALL THE OPINIONS THAT YOU EXPRESS IN YOUR
19 REPORT, INCLUDING THOSE THAT ARE LISTED
20 ON PAGES 2 AND 3, ADDRESS AND RESPOND TO
21 OPINIONS LISTED OR PREDICATES, AS YOU'VE
22 DESCRIBED THEM, IN MR. MALKIEWICZ'S
23 REPORT?

24 MS. NAJAM: OBJECTION, FORM.

25 A. THEY DO.

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 337

1 Q. AND IS THERE ANYTHING THAT
2 YOU'VE HEARD OR READ IN THIS
3 DEPOSITION -- AND BY "READ" I MEAN
4 MATTERS SET FORTH IN THE EXHIBITS THAT
5 COUNSEL HAS PROVIDED TO YOU -- DO THEY IN
6 ANY WAY CHANGE THE OPINIONS THAT YOU'VE
7 EXPRESSED IN YOUR REBUTTAL REPORT?

8 A. NO.

9 MR. RENARD: THAT'S ALL I
10 HAVE. THANK YOU.

11 MS. NAJAM: I HAVE NO FURTHER
12 QUESTIONS.

13 VIDEOGRAPHER: OKAY. THE TIME
14 IS 6:18 P.M. THIS CONCLUDES
15 TODAY'S TESTIMONY. WE ARE OFF THE
16 RECORD.

17 (THE PROCEEDINGS WERE
18 ADJOURNED AT 6:18 P.M.)

19
20
21
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25

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 338

C E R T I F I C A T E

I, MAUREEN M. RATTO, A
REGISTERED PROFESSIONAL REPORTER, DO
HEREBY CERTIFY THAT PRIOR TO THE
COMMENCEMENT OF THE EXAMINATION,
IGNATIUS GRANDE WAS SWORN BY ME TO
TESTIFY THE TRUTH, THE WHOLE TRUTH AND
NOTHING BUT THE TRUTH.

I DO FURTHER CERTIFY THAT THE
FOREGOING IS A TRUE AND ACCURATE
TRANSCRIPT OF THE PROCEEDINGS AS TAKEN
STENOGRAPHICALLY BY AND BEFORE ME AT
THE TIME, PLACE AND ON THE DATE
HEREINBEFORE SET FORTH.

I DO FURTHER CERTIFY THAT I AM
NEITHER A RELATIVE NOR EMPLOYEE NOR
ATTORNEY NOR COUNSEL OF ANY OF THE
PARTIES TO THIS ACTION, AND THAT I AM
NEITHER A RELATIVE NOR EMPLOYEE OF SUCH
ATTORNEY OR COUNSEL, AND THAT I AM NOT
FINANCIALLY INTERESTED IN THIS ACTION.



MAUREEN M. RATTO, RPR

LICENSE NO. 817125

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 339

I N D E X

WITNESS :	IGNATIUS A . GRANDE	8
DIRECT EXAMINATION BY MS . NAJAM		8
CROSS - EXAMINATION BY MR . RENARD		3 2 8

E X H I B I T S

GRANDE EXHIBIT 1 , EXPERT REPORT	3 9
OF IGNATIUS A . GRANDE ,	
GRANDE EXHIBIT 2 , CONSENT ORDER	5 2
IN RE : IME WATCHDOG ,	
GRANDE EXHIBIT 3 , LINKEDIN	5 8
PROFILE FOR IGNATIUS A . GRANDE ,	
GRANDE EXHIBIT 4 , BIOGRAPHY OF	6 5
IGNATIUS A . GRANDE FROM BRG	
WEBSITE ,	
GRANDE EXHIBIT 5 , EXPERT REPORT	7 6
OF MICHAEL A . MALKIEWICZ ,	
GRANDE EXHIBIT 6 , COPIES OF	1 1 4
REDACTED LEGAL HOLD NOTICES ,	
GRANDE EXHIBIT 7 , SEDONA	1 4 4
CONFERENCE VOLUME 20 , DATED 2019	
RE : LITIGATION HOLDS , SECOND	
EDITION ,	
GRANDE EXHIBIT 8 , COPY OF	1 6 7
FEDERAL RULE OF PROCEDURE 37 ,	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 340

1 GRANDE EXHIBIT 9 , DECLARATION OF 195
2 IGNATIUS GRANDE DATED DECEMBER
3 9 , 2024 ,
4 GRANDE EXHIBIT 10 , EMAIL FROM 214
5 KENT WALKER AND [REDACTED]
6 DATED SEPTEMBER 16 , 2008 ,
7 GRANDE EXHIBIT 11 , APPENDIX A14 , 224
8 CORPORATE LEGAL DEPARTMENTS ,
9 AUTHORED BY IGNATIUS GRANDE
10 GRANDE EXHIBIT 12 , COPY OF 234
11 GOOGLE CHAT RETENTION POLICY ,
12 DATED AS OF NOVEMBER 2020 ,
13 GRANDE EXHIBIT 13 , SEDONA 237
14 CONFERENCE , INDUSTRY STANDARDS ,
15 VOLUME 22 IN RE : EPHEMERAL
16 MESSAGING
17 GRANDE EXHIBIT 14 , IMAGE FROM 259
18 EXPERT REPORT ,
19 GRANDE EXHIBIT 15 , TRANSCRIPT 273
20 [REDACTED] ,
21 GRANDE EXHIBIT 16 , INTERNAL 283
22 GOOGLE DOCUMENT ,
23 GRANDE EXHIBIT 17 , CHAPTER 289
24 ENTITLED EDISCOVERY FOR
25 CORPORATE COUNSEL ,

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 341

1 GRANDE EXHIBIT 18 , LETTER DATED 297
2 FEBRUARY 7 , 2020 FROM YETTER
3 COLEMAN
4 GRANDE EXHIBIT 19 , EXHIBIT 4 305
5 ATTACHED TO IGNATIUS GRANDE
6 DECLARATION

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 342

J U R A T

I DO HEREBY CERTIFY THAT I
HAVE READ THE FOREGOING TRANSCRIPT OF
MY DEPOSITION.

IGNATIUS A. GRANDE

SWORN AND SUBSCRIBED
BEFORE ME

THIS _____ DAY OF
_____, 2024

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THE STATE OF _____

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

Page 343

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ERRATA SHEET
I WISH TO MAKE THE FOLLOWING CHANGES :
PAGE LINE FROM TO

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[& - 2015]

Page 1

&	180:23	284:16 330:23	232:17 339:21
& 4:9 7:17 61:25	10940 4:3 10:35 65:7 11 76:5 88:22 92:19 224:13 224:14,19 328:12 340:7 1100 4:10 114 339:18 11:09 87:20 11:44 114:4 12 234:3,10 283:8 340:10 120 71:11 12:02 114:8 13 40:4 59:13 168:18 169:16 171:13 175:15 213:24 237:17 237:22 238:7 239:25 258:23 340:13 1301 2:5 6:23 132 228:6,14,17 14 74:20 75:5 157:8 169:17 259:9,10,14 340:17 144 339:20 15 273:5,9,12 340:19 16 214:7 265:11 273:15 283:13,14	340:6,21 167 339:24 17 266:6,22 268:3 277:16 289:9,10 340:23 17425 338:23 175 4:20 18 285:16 297:17,18,23 309:25 341:1 19 1:17 305:3,8 341:4 195 340:1 198 273:13,15 1:20 177:19	200 72:23 2000 180:5 20001 3:15 2001 23:13 2006 177:8 178:20 183:17 184:5,5,23 292:5 294:4 2007 177:13 178:20 182:25 183:3,12 184:23 230:24 231:15 264:13 2008 43:14 44:6,17,23 45:17 214:7,11 223:23 230:24 330:15,23 331:11,20 340:6 2009 180:5,8,12 180:15 182:16 2010 163:14 182:16 2013 177:9 178:12,20 183:17 2014 56:21 2015 168:12,16 169:20 170:13 170:25 183:4 224:6,8,11 226:14 227:9
0			
00957 1:8 6:21 06 175:15 178:12			
1			
1 39:20,23 72:16 77:3,13 145:12,14 174:10 178:3 247:21 248:18 328:10 329:1 336:1 339:7 10 77:9 214:4,5 214:11 223:25 330:16,22 331:19 340:4 10.j 85:3,4,6,22 319:25 10.j. 318:7 100 75:14 177:12 178:14 10007 4:21 10019 2:6 102 320:24,24 322:24 103 154:2,7 105 161:18 106 174:7 176:12 178:2		2	
		2 52:12,13,23 65:20 225:11 235:15 236:2 236:10 305:20 324:3 335:25 336:20 339:9 20 23:3,4,9,12 23:16 24:24 25:24 34:5 74:20 94:17 110:21 145:1,7 154:24,25 155:3,4,9,17,20 156:13,15 196:4 203:5	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[2015 - 468]

Page 2

227:21 229:4 230:14,18 231:15 277:22 290:17,19 2018 10:21 2019 56:20 100:3 114:13 145:1,7 179:21 187:18 189:10 189:16 226:1,4 256:1,17 261:16 263:7 282:5,15 339:21 2020 177:13 180:3 234:5,24 235:2,3 297:19 298:4 305:19 340:12 341:2 2021 124:24 238:10 2022 211:4 2023 199:7 211:5 229:12 229:18 232:22 264:13 272:13 275:2 277:6 279:15,20 281:22 286:15 322:18 2024 1:17 6:4 95:9 195:18 328:12,17 340:3 342:11	20th 6:4 21 40:2 77:4,15 81:7,19 84:10 84:24 85:25 86:14,19,24 89:18 112:19 113:1 154:24 317:8,14,18 214 340:4 22 156:6 237:19 238:7 340:15 2200 3:6 224 340:7 23 87:25 88:5 88:21 279:8 234 340:10 237 340:13 24 199:24 262:7 332:1 334:18 25 23:1,5,5 259 340:17 25th 235:3 26 288:11,13,14 288:16,19 289:1,4 291:24 292:4 293:13 294:5 310:14 310:20 316:1 316:19,25 27 77:5 273 340:19	27th 69:19 283 340:21 289 340:23 28th 69:23 297 341:1 2:03 177:23 3 3 4:19 58:18,19 257:2 324:3 335:25 336:20 339:11 30 75:14 171:2 232:17 270:20 301:7,11 307:16,19 308:1 305 341:4 31 153:18 154:25 157:7 157:15 161:17 320:23 32 174:6,9 178:6 328 339:4 34 115:3,5 35 43:14 214:16 36 79:10 323:7 37 15:18 16:3 16:21 17:22 18:24 19:13,25 20:14 21:10 167:13,17,19	168:10 169:20 224:1 226:10 227:2 229:1 235:15 236:22 339:25 39 339:7 3:21 223:1 4 4 51:3,3 65:10 65:12 146:14 294:8,10 299:9 305:3,9,19 339:13 341:4 40 111:23 112:5 408 145:5 146:24 290:14 290:23 409 295:19 42 233:9 259:6 43 228:6 441 240:19 443 240:18 241:18 243:3 445 243:12 449 246:19 451 115:12 245:9 454 248:8 455 251:5,6 457 116:15 468 253:2,8
---	--	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[47 - accounted]

Page 3

47 56:9 75:1	62 80:13,18	87 325:9,15	able 20:7,14
471 253:22	85:1,3 124:20	326:2	95:6 184:12
472 254:14	130:7	8th 272:12	194:12 195:4
473 255:23	65 75:13	322:17	228:22 232:15
476 257:1	339:13	9	269:15 276:8
479 256:22	67 40:4 42:2,8	9 195:16,18,21	276:16 277:4
257:8	45:5,11 214:2	226:5 281:7	282:8,11
49 295:21	68 195:6	328:16,17,21	284:13 286:7
4:20 1:8 6:21	209:16 210:1	340:1,3	286:15,19
4:54 280:23	210:18	90 115:4,6	320:2
4th 305:11	6:04 328:2	96 203:5	above 147:3
309:24	6:18 337:14,18	97 324:9	148:19 154:5
5	6:37 317:12	98 3:20 319:12	abreast 23:17
5 76:18,19,22	7	99 320:8,9	23:18,23 24:20
77:13 85:5	7 144:24,25	9:06 1:18 6:3	abston 4:5 7:23
155:3 297:23	297:19 339:20	9th 3:14 195:14	acceptable
321:2,6,9,12	341:2	a	83:18 135:16
322:13 339:16	72 154:21,23	a.m. 1:18 6:3	208:24
500 199:1	75201 3:7	65:4,7 114:4	accepted 76:11
52 339:9	76 339:16	a14 224:15,25	80:3,9 81:3,4
53 92:10,18	77 265:12	340:7	83:12 84:7
96:2 97:6	77002 4:12	abandoned	85:8,18 86:18
103:18,19	77064 4:4	256:3	330:3
54 103:23	78701 3:21	abbreviate	access 73:1,5
58 339:11	799 3:14	251:9	130:8 135:21
59 72:17 156:4	7th 298:4	abide 101:6	136:3 152:23
6	8	102:22	207:8
6 114:17,19	8 167:11,12	ability 83:3	accompanying
115:9 270:20	235:25 321:11	122:7,14	264:1
281:9 339:18	339:2,3,24	201:16 217:25	account 268:16
61 123:21	80 277:17	233:18 257:24	268:18 294:19
125:23	817125 338:25	259:4 273:17	accounted
		280:11 283:4	91:25

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[accurate - adopt]

Page 4

accurate 30:20 55:16 64:24 66:1,11,23 67:23,25 68:1 69:24 74:15 75:24 77:20 91:18 98:13 102:12 108:18 160:11,17 174:3 210:9 226:22 243:24 300:24 301:4 301:18 302:2,3 302:17 307:6 308:19 309:1 313:7 333:10 333:17 338:10	183:5 185:1 acted 236:3 action 7:6 41:24 147:4 148:20 167:1 169:12 249:16 250:15 308:13 308:23 338:18 338:21 actions 144:2 144:13 146:21 147:5 148:16 149:1,24 311:25 actively 10:10 activities 150:10,15 294:15 activity 212:8 actual 83:21 84:5 108:2 158:7 188:25 212:9 230:4 268:15 304:19 actually 24:5 33:5 50:17 51:25 57:14 60:18 61:4 63:22 73:10,24 74:7,18 75:16 75:23 79:4 87:2 92:6 93:7 112:13 114:16 117:18 125:3	129:2 145:15 147:8 148:17 154:13 159:3,5 167:20 169:13 169:15 194:12 199:1 209:21 215:2 220:7 223:19 225:12 226:24 230:17 234:8 244:17 247:9 249:3 259:18 260:14 260:15 266:10 268:2 269:25 270:12 271:24 277:21 286:5 292:2 303:6,21 305:11 307:19 319:23 321:18 322:13 ad 175:5,9,21 176:1,1,16,21 176:24,25 177:4,12 178:18 180:13 183:5 add 267:12 addition 59:17 127:15,20 222:6 243:14 262:9 298:23 334:16 additional 39:21 105:22	106:21 107:15 109:4,4,5 121:1 207:9 additions 56:12 address 86:10 243:15 253:1 302:4 332:2 336:20 addressed 35:24 233:11 254:5 305:14 addresses 130:4 228:4 299:11 adjourned 337:18 adjunct 68:5 adjusting 118:1 136:18 adjustment 118:2 administering 269:2 administrator 268:10,12,15 268:17,21 269:14,19 270:1,5 286:13 administrators 269:12 286:3 admins 265:4 adopt 135:1 249:12
---	---	---	---

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[adopted - alternative]

Page 5

adopted 93:2,7 93:8	64:1,2,6,8,12 64:19 109:8,12	ago 230:25	187:23 208:6,7
adoption 241:13	122:6,13 123:6 123:15 125:5	agree 6:12 24:24 27:13,17	217:15 307:3 318:10
adopts 135:9	193:3,6,19	34:19 35:13	aimed 234:17
ads 174:15	211:8,13,24	46:6 67:18	aims 235:6
176:10 178:14	274:2	117:25 118:9	akin 306:1 307:4
179:7,10	advises 135:20	148:1,8 150:7	al 1:6 3:4 6:15
183:15 184:14	advising 24:18	151:1 162:16	albeit 216:12
186:20 187:12	27:1 29:11	190:1,13 191:7	alex 4:5 7:23
187:21 189:6	50:1 63:17	219:24 223:12	alex.abston 4:6
189:13	64:23 104:7	223:18 236:21	allegation 14:7 191:5
advance 242:14	185:8 237:6	237:4 239:12	allegations 180:17 189:4 189:19
254:1	advisor 11:12	244:23 247:20	alleged 19:9 26:8 155:18 171:21 180:13 187:6,12 317:22
advent 290:25	11:12 111:2	249:23 255:6	allow 233:21
adversaries 242:4	advisory 50:6	258:13,20	allowed 120:15 126:9 147:10 231:10 271:16
adversary 315:12	168:11,16	263:13 272:21	allowing 40:11 257:12
adverse 46:25	169:19 170:24	287:5,17	allows 15:21 128:21 235:15
226:16 235:16	171:11 292:2	291:18,21	alpha 284:21 285:21
advertising 102:6 187:19 314:23	294:4	293:7,11	alternative 125:18
advice 49:4,6	affect 34:7	295:12,14	
109:17,21	109:6 201:15	296:23 302:23	
110:2 130:7	221:6 257:25	302:24	
192:20 220:25	311:25 312:2	agreed 16:21 153:24 294:9 294:12 311:18	
221:11,14	312:17	agreeing 294:20	
269:7	affected 312:12	agreement 71:3	
advise 24:5,11 24:15 186:14	affiliations 7:13	agreements 129:13	
advised 26:24	afforded 235:23	agricultural 61:16	
50:18 63:14,22	agencies 183:8	ahead 9:21 43:24 97:11	
	agency 64:15 64:17,17		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[alternatively - application]

Page 6

alternatively 257:11	analyst 51:21	answering 93:18 174:23	anyway 84:20
alternatives 125:6,16 136:17	analytics 158:12	answers 8:22 84:21 310:16	apart 333:16
altogether 189:25	analyze 55:1,1 194:16,17	anticipate 161:24 162:11 171:20,24 182:20 184:16 193:21	apologies 23:15 43:19
amendment 168:12,17 169:20 170:13 171:1	analyzed 53:17	anticipated 152:3 174:2 175:3,19 176:14 180:19 186:19 187:11 187:18 189:11 304:19	apologize 172:22
amendments 224:8 226:14 292:3,5 294:5	announce 49:14	anticipating 184:13 326:17 327:3,9	apparent 241:21
americas 2:6 6:24	announced 218:17,20	anticipation 177:7 182:4 184:24	apparently 217:24
amount 202:16 203:11 207:19 208:13 209:1 220:18 223:19 263:11 266:9 313:5 315:2	announcement 218:16 219:6	antitrust 180:17 181:12 181:25 183:14 187:7 188:9,13 189:20 216:23 217:4 228:21 230:9 231:18 232:8	appeals 185:18
anajam 4:14	annual 146:7	anybody 141:9 195:6	appear 199:14 259:20 260:9 334:22
analysis 53:24 76:6 185:13 186:7,11,13,16 194:10,24 195:1 197:18 198:9,14 200:11 202:11 202:21 203:16 204:4,8 206:6 207:7 268:1	answer 9:10,15 9:21 11:8 18:6 19:23 20:5,7 21:17 25:5 38:18 75:4 80:20 95:16 99:3 101:11 130:2,2 141:7 141:21 149:25 163:14 164:3 165:19 167:5 192:25 201:16 208:1 267:23 269:24 302:22 304:4 313:14 314:4,14 318:5 320:5	anymore 220:23	appearance 7:11
	answered 78:9 84:9 85:24 97:4 214:20		appearances 7:13
			appendices 73:23
			appendix 56:7 72:17,19 73:10 73:14,14 74:1 75:8,21 76:3 153:11 168:2,4 224:14,25,25 225:2 311:14 340:7
			applicable 190:10
			application 125:12 136:13 145:25 257:15

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[applications - attachments]

Page 7

applications 247:14 248:12 257:7	65:7 71:11 114:8 280:23 321:14 328:2	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
applied 38:2 76:9 278:5,16 278:20 282:25 330:10	apps 115:14 arbitration 55:22 61:3 area 32:2 66:16 183:5 185:3 189:5 253:1	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
applies 75:8 253:9	arbitration 55:22 61:3 area 32:2 66:16 183:5 185:3 189:5 253:1	asking 22:6 45:7 86:8 108:21 116:24 121:18 133:12 138:4,6 140:16 142:19 144:17 185:9 188:3 200:5 207:13 212:16 231:24 237:4 252:3 261:7 266:19 266:24 267:3 268:22 295:8 319:21 326:22	asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
apply 105:23 190:25 236:23 237:9 253:13 271:6 278:20	areas 84:16 175:23,24 185:20 254:19 254:24	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
applying 102:15 140:8 271:1	argument 21:24 120:24 arianna 223:7	asking 22:6 45:7 86:8 108:21 116:24 121:18 133:12 138:4,6 140:16 142:19 144:17 185:9 188:3 200:5 207:13 212:16 231:24 237:4 252:3 261:7 266:19 266:24 267:3 268:22 295:8 319:21 326:22	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
appointed 51:5 51:13,17,25 52:6,9 55:18 55:21 56:1	arises 9:3 27:11 34:18 35:12 36:13 162:18 163:5 236:25 237:11 257:14	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
appointing 52:20	arising 166:25 169:12	asking 22:6 45:7 86:8 108:21 116:24 121:18 133:12 138:4,6 140:16 142:19 144:17 185:9 188:3 200:5 207:13 212:16 231:24 237:4 252:3 261:7 266:19 266:24 267:3 268:22 295:8 319:21 326:22	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
appointment 52:5,25	arose 211:1	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
appoints 170:5	arrive 202:21 204:5	asking 22:6 45:7 86:8 108:21 116:24 121:18 133:12 138:4,6 140:16 142:19 144:17 185:9 188:3 200:5 207:13 212:16 231:24 237:4 252:3 261:7 266:19 266:24 267:3 268:22 295:8 319:21 326:22	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
appreciate 20:2	article 30:23 56:18,18	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
appropriate 147:19 148:4 239:14	articles 56:20 67:9	asking 22:6 45:7 86:8 108:21 116:24 121:18 133:12 138:4,6 140:16 142:19 144:17 185:9 188:3 200:5 207:13 212:16 231:24 237:4 252:3 261:7 266:19 266:24 267:3 268:22 295:8 319:21 326:22	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
approved 123:24	aside 26:25 53:6 164:1 175:14 189:8 258:23 287:4	asked 9:16,23 44:1,9,13 47:6 47:25 50:21 84:2 96:13 121:3 132:3 166:2 167:16 168:20 187:14 213:6 267:5 273:16 286:1 292:7 294:8,11 300:12 304:5 328:8,14 329:21 330:14 332:22 335:1	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18
approximately 6:3 23:4,5,9,12 23:16 30:12		asks 11:6 aspect 82:10,13 82:23,25 186:20,23 aspects 83:11 84:6 85:17	86:17 asserting 326:1 assertion 80:10 assertions 185:2 assets 251:10 assigned 170:11 assist 252:14 assistance 25:1 assisted 71:17 associated 29:23 30:3 57:12 248:11 assume 8:19 9:16,22 155:10 157:16 184:5 231:1 256:12 assumed 160:16 assuming 75:7 220:23 assumption 80:22 160:3 assumptions 199:2 attached 19:21 29:18 225:8 305:4 341:5 attaches 243:5 attachment 259:22 attachments 267:18

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[attempt - based]

Page 8

attempt 214:17 288:19 291:7 315:11 attempted 40:6 40:22 44:15 45:12 288:4 attempting 39:3 attend 72:2,6 146:8 attended 71:23 attending 7:12 attorney 7:15 11:4,5,13,24 12:3 21:20 32:9 48:17,22 100:5 119:14 269:1 298:17 299:11 305:13 306:15 338:17 338:20 attorneys 1:14 12:4 133:3 165:14 auctions 314:22 audience 169:24 225:17 audio 6:10 audits 302:6 austin 3:21 author 309:4 authored 224:16 289:22	340:9 authority 92:25 93:6 129:22 133:6 auto 172:5,16 172:24 173:15 automatically 172:4 199:25 255:8 256:12 262:9 available 65:18 71:21 74:12 75:23 82:22 111:17,18 141:13 152:23 208:4 209:19 266:1 271:17 274:22 275:6 276:6,7,12 286:23 290:8 311:13 avenue 2:5 3:6 6:23 avoid 24:12 100:24 117:6 118:10,20,24 216:1 218:21 227:25 291:24 295:16 296:1 296:11 315:24 aware 69:7 71:2,6 88:9 99:20 100:2,6 100:8,22	119:11 120:10 143:7,12,25 176:14 189:14 211:5 212:14 237:8 238:21 244:16 256:7,8 286:12 302:16 310:5,10,11 311:2 312:11 316:9 ayesha 4:13 7:16 b b 27:5 74:2 139:13 168:2,4 270:20 288:11 339:6 back 13:16 15:9 17:22 22:24 30:3 32:17,25 36:9 42:13 47:16 65:8 80:12 81:6 92:10 95:24 99:25 100:21 103:17 107:18 114:9 125:22 130:1 148:7 150:5 156:13 158:6 159:2 161:1 177:13,23 180:4 188:23	204:6 209:15 211:14,25 212:16 223:1 223:23,25 224:3 235:20 240:18 256:17 257:8 269:23 271:2 279:24 280:24 285:16 296:22 319:7 328:3 backup 191:18 backwards 94:25 200:7 217:16 bad 147:13 315:13 317:20 balanced 242:11 bar 264:9 barred 227:3 based 26:8 35:21 36:19 37:3 42:9 43:3 43:10,12 44:4 44:23 45:6,17 77:18 90:21 94:16 97:6,19 102:10 117:22 124:12 131:7 131:25 160:3 171:7,15 174:1 198:4 201:6 206:9 207:8
--	---	--	---

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[based - bigger]


Page 9

208:3,22 229:7	behalf 3:3 4:8	140:3 145:21	believed 84:17
229:18 250:4,5	7:17 27:4	148:23 151:11	90:6
250:6 252:9	belief 86:10	163:21 164:22	believes 78:17
261:19 277:10	91:8 209:22	174:19 175:6	78:17 91:5
278:25 279:5	believe 12:24	177:8 179:13	beneficial
286:21 306:21	14:20,23 16:17	180:3,24	296:8
310:23 322:3,6	20:19 23:3,10	181:21 182:16	benefit 78:23
330:2 332:15	23:10 24:6	188:21 189:22	benefits 98:1
bases 45:22	27:7 33:9	190:9,11 195:3	241:2 243:23
basic 8:20	34:11,22 35:17	195:11 201:9	248:14,18
basically 9:2	35:21 36:20	208:21 225:3	254:17 255:13
183:19	38:16,25 39:9	225:23 228:20	berkeley 29:24
basics 42:14	39:15 41:17,18	230:24 235:21	52:25
basing 208:17	43:16 44:13	236:20 238:23	best 24:7 33:18
basis 37:19	51:11 52:3,7	239:18 244:5	86:24 117:6
43:20 44:10	53:20,22 54:23	252:12 253:7	134:12 135:17
45:24 79:18	56:19,21 65:19	254:8 259:3	135:19 137:7
80:11,21 81:14	66:13,13,25	260:18 263:17	147:17 221:25
84:20 113:7	67:1,24 68:24	270:14,16	223:9 248:20
142:7 164:15	69:2,4 72:14	271:13 272:5	258:15,16
200:5 214:22	78:13 81:7,14	274:25 282:24	318:16 319:17
280:6 302:1,24	81:17,23,25	283:11 285:8	320:17
bate 75:20	83:16 84:9,21	286:22 287:11	better 17:13
bates 115:11	86:5,7,14,24	287:23 290:18	27:1 78:2
283:21	87:21 88:7,12	291:14 295:6	87:14 118:7
bathroom	90:5 91:4 93:1	296:17 311:9	135:24 144:9
222:21	94:1,18 97:18	311:15 312:16	210:5,8,11
bedrock 131:5	97:19 104:22	314:4 316:3	266:3
beginning 7:14	108:25,25	322:1,19	beyond 75:8
59:11 240:19	109:3 111:17	323:25 324:17	big 174:11
253:21 295:14	116:12 120:25	324:23 329:15	189:23
begins 146:25	123:10,13,19	329:19 330:9	bigger 233:12
178:2 226:7	126:15 130:23	332:10,16	259:16
	131:13 132:2		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[biggest - call]

Page 10

biggest 219:25  43:15,17 214:6 340:5 billed 71:11 bio 65:21 biographies 30:19 biography 29:23 30:15,25 65:12 339:13 bit 110:20 166:4 189:24 231:13 237:13 281:2 black 119:8 120:20 blinded 166:24 169:11 blog 277:22 bold 117:13 bonaparte 3:16 book 225:20,21 225:22 289:14 297:9 border 242:15 254:21 bottom 196:5 215:7,9 251:6 284:1 boulevard 3:20 boundaries 295:4 box 60:2 120:20	boxes 119:9 breach 216:3 break 9:4 34:16 64:7 65:2 112:3 114:3,10 167:10 174:7 177:17 201:15 213:18 222:19 223:8 280:18 281:11 327:21 breaking 9:2 63:7 166:5 277:25 breaks 9:1 334:22 brg 10:25 29:23 51:18,20 52:1,5,8 65:13 109:25 110:7 224:22,23 339:14 brg's 65:18 bring 34:11,12 39:21 bringing 296:22 314:25 brings 186:25 broad 83:15 85:25 86:1 150:8,13 191:8 294:13 325:22 325:25 broader 28:15 138:6	broadly 286:4 broken 271:24 broker 106:18 283:2 285:4 brought 11:19 39:21 152:4 bruckhaus 4:18 bruns 4:9 7:17 bubbles 284:9 bullet 115:18 116:15 245:19 247:21 bunch 17:12 burden 265:2 burdensome 265:13 266:13 279:21,22 332:4,8 burdensomen... 268:7 burn 171:2 business 58:12 77:19 78:5 79:15 81:16 90:22 91:3,6 91:16,18 92:1 174:15 175:5 175:10,22 176:1,6,9,17,22 176:24,25 177:1,4,6,12 187:13 189:13 242:14 249:15	250:1,7,14 251:10 252:8 252:16 254:2,4 254:12 255:21 274:17 317:24 318:15,21 319:16 320:16 businesses 249:24 button 199:11 199:12 buttons 304:13 buys 225:20
c			
c 3:1 4:1 5:1 72:17 73:14,14 75:8,21 76:3 181:13 182:13 299:18 311:14 338:1,1 calculated 321:7 calculation 90:1 208:3 calculations 203:19 california 10:18 call 15:23 93:7 100:12 151:13 164:20 213:2 221:21 232:13 247:10 315:5			

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[called - certain]

Page 11

called 106:9	17:12 18:20	182:22 185:17	22:20 32:8
129:9 145:19	19:8 21:18	186:12,12,16	35:22 36:1
225:5 245:11	23:25 24:20	186:16 187:15	39:4 40:7
245:12 257:1	25:11 27:2	190:10 191:6	42:25 45:13
270:12,15	29:16 32:23	196:18 197:4	51:4,13 55:20
289:15 292:13	33:2,12,25	197:13 198:16	98:23 119:17
292:19 300:21	34:4 35:12	201:7,11 202:9	121:18 122:20
calling 133:16	36:15,18,23	202:18 203:25	147:1 184:22
299:18	37:6 38:2,12	207:3,5 208:4	208:20 209:11
calls 160:19	38:24 40:24	209:18 210:23	211:20 213:10
255:17 299:25	41:14 42:1,15	212:3,4,13,15	214:18,21,23
300:2,10	46:12,24 47:21	213:1,4,5	310:7 313:9
candid 296:9	51:21 52:12,19	220:20 229:8	317:4
cans 192:11,23	54:23 55:11,12	229:13 231:11	categories
193:4	56:4 61:9,11	235:21 238:3	247:17
capability	67:19 68:13,21	239:22 251:1	category
125:13 136:14	69:3,8,13,18,25	255:1 260:24	248:10
137:23 273:24	71:3,9,12 76:1	261:10 264:19	cause 243:6
334:11	76:10 97:23	265:2 280:15	causes 161:23
capable 138:19	99:21,24	288:1,7,22	162:10
143:3	101:24 102:4	291:9 292:24	cellphones
capacity 63:20	110:9 111:5,6	293:22 295:1	53:18
165:6	111:13 115:2	296:9,21,23	center 4:11,19
capital 299:18	116:17 120:15	297:8 298:19	10:9
care 228:10	121:14,16,17	299:7 300:5	certain 18:1,8
229:6,17 230:3	121:25 137:25	306:16 310:5	18:21 22:16
career 32:5	139:10 142:24	311:5 312:10	38:14 39:5
62:9	147:9 148:22	312:20 313:17	41:2 42:3
careful 147:2	152:11,16,25	314:3,15,16,19	63:16 84:14
148:17	153:17 158:21	314:24 315:6	105:21 106:4,7
case 1:8 6:17	159:7,21 160:8	316:3,9 322:7	106:19 107:7
12:5,10,23	165:9,12,22	326:8 330:2	132:5 144:12
13:19 14:18	166:9,16	cases 17:16	146:20 179:23
16:2,7,14	167:21 178:23	21:23 22:4,7,9	182:15 185:20

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[certain - chats]

Page 12

185:20 191:20	260:20 263:18	38:22 39:5	235:5 244:25
199:10 200:1	265:6 267:2	41:2 71:5 80:2	245:21,22
205:19,19,22	268:7 272:8,10	80:8,15 81:2	247:20,25
206:12 221:8	273:19 275:24	81:12,21,24	259:23 260:10
221:18,22	277:8 279:7,14	82:11 84:6	260:23 261:8
229:23 241:2	279:19,23	85:7,17 86:15	262:17 263:24
245:18 247:23	280:7,12	88:16 89:16	264:3,4,6,21
252:21 276:16	282:11 286:17	92:13 93:11,20	265:4 266:21
277:3,8 283:1	299:12 328:20	95:2 96:16	269:17 270:21
283:1 285:2	328:24 337:6	97:23 98:17	271:24 273:19
290:22 294:9	changed 224:9	99:10 100:24	274:18,23
313:3 317:4	224:11 227:8	102:5 103:10	276:18 277:6
324:9	238:24 263:15	110:10 111:4,5	278:5 280:10
certainly 177:9	changes 170:14	115:19 116:3	282:9 285:13
certified 2:9	275:1 282:23	116:16,20	285:17 286:7
certify 338:4,9	291:1 343:1	117:6,13,18,23	286:19 296:22
338:15 342:3	changing 49:17	118:3,10,21,24	297:1 299:18
cessation 150:8	251:14	122:7 125:14	300:15 303:7
150:12,13	chapter 225:3,9	126:7 128:7	304:24 305:19
294:13	225:17 289:10	138:5,18,24	305:23 307:21
cetera 45:15	289:14,17	139:5,11	307:25 309:13
264:1	291:20,22	142:21,25	309:19 318:14
chains 252:19	295:7 296:16	143:11,21	319:14,24
chance 32:12	297:10 340:23	158:22 193:25	320:10,15
33:17 61:24	characterizati...	196:19,19	323:13,15
162:20 163:7	318:13 319:13	198:18,19	324:7 325:2
315:12	characterize	199:5 200:16	333:1,3,8
change 149:11	247:13	201:12,12	334:7,23 335:5
193:24 199:4	characterized	209:15 211:1	335:11 340:11
218:17,20,25	248:6	211:15,25	chats 39:13
219:5,6 224:4	characterizes	212:17 213:7	40:12 42:13,17
227:9,10,15	245:16	218:17 219:15	42:22 44:16
233:2 256:1,10	chat 14:24 18:9	233:14,22	46:3 76:10
256:16,17	18:21 38:6,14	234:4,11,12	83:4 89:24,25

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[chats - client]

Page 13

90:1,2 91:5,17	335:11	154:23 157:7,9	288:3 291:3
94:8 95:11	chatting 285:23	165:22 167:23	299:5
97:13 98:23	check 317:11	167:24 187:16	claim 38:6
99:13 110:24	cheese 199:15	189:9 196:23	76:21 162:20
124:1 126:4,16	200:25 262:19	197:7 209:5	162:23 163:8
129:11 137:23	333:25 334:6	214:16 227:22	163:10 171:25
138:2 152:14	334:20	229:2 253:1	186:25 295:16
152:18,22,24	choices 257:5	282:5 322:23	claiming 37:19
153:8 198:10	chose 281:14	324:9 325:10	claims 152:3,6
198:25 199:10	281:22	326:13	152:9 161:23
199:14,20	cid 100:12	cited 21:23	162:9 184:13
200:1 209:20	114:12 189:16	22:7,9 25:18	187:11,19
210:12 211:6	298:24	35:5 124:5,16	189:2,11
219:17 229:7	circles 249:6,8	133:5 144:19	315:19 319:14
231:11 232:2,5	circuit 28:2,10	155:17 168:5,8	clarification
235:7 252:20	28:17,24 32:6	218:12 230:12	9:20 244:14
261:5,20,22,24	163:14	230:17,18	clarifications
264:24 266:7	circumstance	234:13 253:3,5	310:1
267:7,12,16	239:15	277:16 278:9	clarify 33:6,8
269:22 276:23	circumstances	278:15,15	33:17 51:23
280:8 281:13	144:12 146:20	283:8 285:9,10	91:2 118:5
282:9 301:10	166:18 186:13	298:5 305:2	186:22
306:22 308:6	245:18 247:24	320:1 326:11	clean 269:24
308:12,17	citation 93:4	335:24	clear 41:10
309:10,16	citations 96:7	cites 89:7 96:3	61:2,19 79:3
312:1 316:11	cite 17:12,15	147:8	82:7 91:12
317:23 318:20	20:21 22:4,20	citing 115:8	139:9,18,22,24
321:2,7,16,23	42:10 45:20,21	124:22 165:9	141:2 143:17
322:6,7,14	77:3 81:7	215:9 323:9	162:13 309:14
331:1,6,11,13	92:19,24 126:1	city 6:24	clearly 319:19
331:17,25	127:1 129:21	civil 17:9 100:3	clerked 31:22
332:4,8,13,17	137:19 138:8	169:25 170:7	click 260:18
333:7,14,16	138:14 140:25	179:22 180:5	client 14:3
334:21 335:1,5	141:23 142:12	183:21 226:11	48:17,22 49:11

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[client - companies]

Page 14

119:14 269:8,8 311:19 client's 49:16 clients 26:14,18 26:24 48:10 55:7 110:15 128:13 129:14 129:15,17,21 211:18 237:6 269:10 282:7 283:25 284:13 284:17,22 285:1 clifford 32:12 61:24 clock 259:21 260:2,5,8,16 263:25 closer 242:10 clump 321:16 coach 216:20 cocktail 11:7 code 194:21 265:15,18 coleman 297:20 298:5 298:12 341:3 collaborative 293:4 colleague 71:17 colleagues 110:6 collected 98:3 150:4 216:22	288:1 collecting 192:13 223:20 collection 98:12 147:3 148:19 combination 53:17 133:3 147:2 148:18 153:14 232:9 248:1 come 32:17 35:17 132:12 132:15 136:24 140:21 150:5 153:2 186:3 197:19 202:11 269:23 318:18 comes 34:25 105:20 107:13 108:22 109:10 134:18 comfortable 58:4 coming 132:21 141:14 185:7 commencem... 338:5 comment 91:13 216:8 284:9 commentary 130:3 136:9,12 170:17,25 238:8 244:5	comments 241:1 committee 168:11,16 170:4,6 171:12 292:3 294:4 committee's 169:19 170:25 commodities 61:16 common 27:14 27:17 28:2,17 28:23 29:1,7,9 31:5,11 32:21 33:11,22 34:19 35:1,7,13,22,25 36:5,12 104:13 104:16 123:23 124:6 125:24 127:2,7,10 128:3 129:1,9 129:23 243:4 commonly 126:3 communicate 40:9 228:10 229:5,17 230:2 257:13 291:3 communicated 173:8 communication 77:18,19 78:6 82:3 84:15 90:3,21,23	92:4,16 93:13 93:22 94:12,21 94:23 95:5 97:15 98:20 119:15 123:18 173:17 227:22 230:5 250:5 251:22 252:10 284:19 305:25 318:16 320:17 327:14 communicati... 40:10 81:17 91:4 92:2 94:10 96:19 97:13 103:13 117:17 136:15 138:23 144:3 173:19 216:1 217:12,19,20 229:3 252:18 252:21 257:18 258:12 317:24 318:21 319:16 319:25 334:10 companies 22:10,15 24:6 49:18,24 62:3 62:9,11,15,22 63:12,13,18 64:1 89:2,11 95:10 104:6,14 104:16,19 105:2,10
--	--	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[companies - conference]

Page 15

108:17,19,20	163:3 182:19	completely	concluded
108:23 109:2,2	185:15 186:1	122:6 224:5,7	161:6 181:20
109:3,12,13	186:14 187:3	224:10 226:13	181:22 201:1
122:5,12	193:3,7,20	226:25 227:11	concludes
123:23 125:25	211:9,13,24	complex 50:15	161:5 337:14
126:2 127:3	212:6 213:6	216:3	conclusion
128:17,25	220:17 221:17	compliance	160:3,25
129:6 134:17	221:20 222:5,7	16:9 241:24	185:17 198:3
135:8,12,20	222:12 223:13	242:15 248:23	201:3 204:5
138:10,22	223:15 228:23	complied 53:20	325:20
141:25 142:14	228:24 231:1	53:21 54:3	conclusions
144:1,12	231:19 232:16	113:25 289:3	12:25 13:1
146:20 148:14	266:9 268:21	comply 139:18	88:3 157:14
149:9,21 177:1	269:3 274:19	139:19 140:14	216:2 324:21
185:8,20	280:10 286:6	141:17 279:5	325:8 329:9,17
219:25 220:3	286:13,18,21	complying	336:12
220:10 221:3,6	287:7,18	223:20	concord 147:9
221:12,15,20	company's	comprehensive	conduct 255:5
252:6	107:12 109:15	257:6	confer 287:7,12
company 24:15	110:24 111:14	computer	287:19,24
24:18 50:18	150:10 222:2	150:9,14	288:11 289:2,6
52:1 61:13,15	287:8,20	158:25 195:9	310:13 311:1
61:17,20 62:13	competition	265:18 294:14	conference
63:22 64:3	314:10	computers	35:4 56:19
105:19 109:9	competitor	53:18	88:1 89:8 94:4
109:24 110:11	172:14	conceal 255:4	94:6 124:15,23
123:6,15,24	compiled 133:3	conceivable	130:5 132:25
128:5 129:2,8	complaint	190:6,15	134:16,20,25
130:14 131:13	152:10,11,16	concern 220:4	135:7 136:1,8
131:19 132:5	314:12,13	concerns	136:24 137:5
136:2 137:1	complete 112:2	241:13 243:21	137:10,17
138:17 143:8	150:7,13	254:22	144:20 145:1
143:19 151:7	294:13 333:9	conclude	237:14,18
161:24 162:10	333:17 334:23	182:14	239:25 240:12

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[conference - convenient]

Page 16

242:20,25	confusing	considered	content 41:8
291:24 292:8	140:8,11	50:5 72:19,25	contents 101:8
292:13 293:13	141:16 162:5	73:3 333:9	335:25
316:1,19,25	259:20 262:4	considering	contesting
339:21 340:14	262:22 263:20	137:2 318:9,11	272:19
conference's	267:4	consistent	context 12:24
134:6 135:18	confusion	89:16	15:3 26:19
conferences	141:3 200:25	consolidated	81:18 89:6
57:9 287:12	233:9 261:16	310:7,12	91:22 112:17
289:7 311:1	263:7 303:21	conspiracy	113:12 142:24
conferring	connected 68:6	171:21 172:13	146:22 198:13
295:1 304:20	324:1	173:21	204:15,17
confidential	connecticut	consultant	206:7,15,18
1:13 47:18	10:14	23:22 25:10,13	215:15 265:23
48:9,11,16,21	connection	25:19 63:21	294:25 297:7
49:3,3,8,12	56:19 66:14	67:20 98:2,11	continue 6:11
50:5,25 119:14	67:2 115:1	consultants	20:1 79:23
284:2 298:22	116:16 187:15	25:2 49:1	184:7
298:24	188:6 203:18	165:15	continued 4:1
confined 70:16	207:25 211:19	consulted	5:1 229:17
confirm 52:18	254:18 269:4,5	239:4	230:3
55:4 58:23	311:5	consulting 10:2	continues
65:16 76:19	consent 52:13	10:25 47:19	301:20
114:24 195:20	53:21 339:9	48:7	continuing
214:10 283:18	consequences	contain 94:9	216:9 311:7
298:2 299:3	316:20	95:14,19 97:14	contract 216:3
conflicting	consider 48:16	103:11 335:19	contrary
243:16	49:17 50:25	contained	293:22
confused	62:15 125:6,15	75:21 100:15	controlling
113:11 140:19	136:17,22	115:9 321:8	251:11
199:8 259:1	221:25 246:7	contains	convenient
260:25 261:2	254:16,17	157:11	63:6 166:5
298:2	255:13,21	contemplate	277:25
	318:13 327:2	293:20	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[conversation - couple]

Page 17

conversation 67:3 199:17,21 262:10,15,19 308:14,23 309:4 325:18 333:3,22 334:8 334:12	corner 278:4 corporate 67:6 218:24,25 224:15 225:10 225:12,18 235:7 242:12 254:11 256:2 289:11,15 331:16 340:8 340:25	181:17 190:16 190:17,20 196:7 200:12 200:17 222:16 224:22 225:15 236:6,10 238:12 245:24 245:25 246:4,5 249:7 258:1,6 268:5 277:23 283:6,19 291:20 294:6 301:12 328:12 328:17	costs 235:12 [REDACTED] 43:15,17 44:6 45:18 214:6,12 223:24 340:5 [REDACTED] 215:6
conversations 6:8 49:12 229:19 262:20 301:7,15,24,25 302:15 306:21 309:2,17,18 333:8,15 334:23 335:5 335:11,18	corporation 59:19 corporations 191:19 correct 8:15 10:3,7 13:3,24 14:25 15:4 30:16 32:3 43:11 45:18 47:13 52:3 55:17 56:3 59:20 66:7 68:10,11 70:6 72:4 75:6 82:5 91:1 92:8 96:9 104:1 106:11 107:4 115:9 123:2 124:25 125:1,21 137:13 139:14 143:5,22,23 151:16,20 155:1 161:8 175:10 176:19	corrections 56:12 correctly 17:2 40:14 44:12 60:11 73:5 79:20 89:4 105:15 115:16 116:4 117:20 124:3 176:18 242:7,17 243:18 249:1 251:15 257:20 282:12 296:4 correspondeen... 51:22 183:24 259:23 cost 265:21 266:5,19,20 267:1,6,9,15 268:3	counsel 7:12 48:13 63:4 111:24 220:6 225:18 243:14 277:24 288:5 288:10,20 289:1,12,15 291:8,12 299:10 300:2,3 300:18 302:10 305:14 306:19 307:8,14 308:10 337:5 338:17,20 340:25 counsel's 336:4 count 195:5 197:20 country 31:19 couple 44:2 62:24 63:1 70:1 71:10 104:5 116:21 198:21 258:24 289:25 290:2 299:25 317:5 336:3

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[course - data]

Page 18

course 30:7,8 30:10 62:9 65:23 68:7 133:24 198:5 court 1:1 2:9 6:18 7:2 13:15 15:21 17:23 21:11 25:25 41:13 46:13 51:22,24 53:22 78:23 164:1,11 170:11 191:23 196:11 231:1 231:14 232:15 235:16 282:5 283:10,23 315:14,21 329:10 court's 46:7,23 47:4 courts 17:17 20:25 23:19 24:25 35:17 36:1,4 134:17 226:16 240:1 242:3 243:15 253:25 254:16 255:2,7,13,20 316:23 cover 109:1 297:22 covered 56:22 96:11 104:4 115:15 117:5	117:14 118:13 201:25 211:4 219:16 254:6 covering 29:10 183:24 covers 57:20 86:7 create 191:25 230:9 231:18 271:4 273:17 created 127:17 212:23 312:9 creates 215:19 233:13,13 280:10 creating 227:25 234:17 270:25 274:17 275:10 creation 234:18 credible 177:6 184:24 credibly 161:5 180:18 184:15 credit 256:6 cripple 191:19 critical 82:17 219:1 242:5 critically 318:17 319:17 320:18 criticizes 250:21 criticizing 250:11	cross 242:15 254:21 328:4 339:4 cs7075142 1:24 csv 194:13,15 culling 293:23 culture 46:1 229:9 231:9,16 232:2 331:9 cure 53:12 306:12 current 24:4 184:22 228:25 264:10 287:9 287:20 311:8 currently 10:1 10:10 24:11 29:25 30:4,6 31:25 44:23 52:1 68:16 179:15,18 186:2 custodian 323:12 324:6 325:1 custodians 153:23 179:11 194:2,7 203:24 205:3,6 206:1 207:7,21 208:15 257:16 283:2 301:21 302:6,11 321:8 321:25 322:15	323:11 customer 277:5 customers 126:18 264:3,7 266:1 271:16 272:7 274:22 275:7 276:7,11 276:17,17,22 282:16 cut 323:4 cv 1:8 6:21 29:15 31:22 56:9,13 58:14 158:8 225:3,7 d d 8:5 181:13 182:13 339:1 daily 128:15 dallas 3:7 damning 14:18 280:15 daniella 3:10 7:22 daniella.torre... 3:11 data 12:19 13:3 13:5 37:6 54:7 89:2,4,12,13 131:10 136:15 158:11 173:5 194:16,18 195:1 202:16 203:11,21
--	--	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[data - defendant]

Page 19

206:20,25	184:6 185:7	301:11 307:16	decisionmakers
207:9,19 208:4	188:4 191:23	307:20 308:2	242:1
208:13 209:2,8	195:19 211:3	dc 3:15	decisions 17:16
219:25 220:1,7	212:18 214:8	de 61:24	23:19 36:3
220:13,18,22	224:4,17 226:3	deal 189:4	98:4 150:3
221:1,8,11,14	229:20,23	198:12 203:19	declaration
221:21 222:1,6	234:6 237:21	206:15,24	13:19,22 14:1
222:8 223:14	238:19 259:12	207:3 209:11	14:6 21:23
223:20 242:15	273:7 275:2	dealers 106:18	22:5 27:4
243:7,22	279:23 280:9	283:2 285:4	195:13,16,22
248:21,24,25	283:16 286:18	dealing 34:6	195:25 196:11
249:11,13,14	289:13 297:21	127:16 179:15	196:14 197:9
249:16,19,25	301:4 305:6	179:18 183:20	198:7 202:3,24
250:1,13,15	312:4 316:14	209:2	281:6,11,18,19
251:10 252:8	330:21 331:13	dealt 297:13	283:20 287:4
252:15 254:7	331:21 338:13	decade 230:25	297:25 305:5
254:11,20,21	dated 145:1	december 1:17	305:10 328:16
267:9,11 268:3	195:17 214:6	6:4 179:21	328:21 329:4
287:25 296:19	229:21 234:4	189:10 195:14	329:17 340:1
296:20 312:13	297:19 305:10	195:17 224:6,8	341:6
312:18 314:1	309:24 328:11	226:14 328:12	declarations
321:24 329:16	328:16 339:21	328:17,21	13:8 75:15
332:5	340:2,6,12	340:2	declared 196:5
database 153:2	341:1	deceptive	default 82:14
153:6	dates 58:13	187:20 188:7	82:18,21
date 39:25	175:14 176:17	188:18 189:2	103:25 104:11
52:15 58:21	dawns 290:12	189:12 314:11	105:4 107:21
59:2 65:15	day 72:7	decide 24:25	108:5 199:5
66:2 68:4,12	198:25 199:1	decided 39:4	218:24 232:25
69:17,22,23	342:11	101:19 218:23	233:2 282:8
71:13 76:25	days 195:6	331:15	300:22 331:16
95:6 114:21	205:19,22	decides 191:24	331:19,22
145:4 167:14	209:16 210:1,3	deciding 16:20	defendant 1:10
178:11 179:3	210:18 301:8		2:3 4:8 103:15

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[defendant - difference]

Page 20

147:10 313:4 defendants 53:19 103:21 defense 135:15 defensible 192:15 220:21 define 62:10 definitely 113:23 definition 247:15 degree 10:4 degrees 204:9 delete 223:16 deleted 40:13 221:22 307:16 307:20 308:1 308:24 deletes 221:8 deleting 46:2 deletion 89:3 89:13 172:5,16 172:24 173:15 220:8,21 221:1 222:1,8 308:5 demand 100:4 114:13 179:20 179:23 180:6 183:21 299:6 department 240:7 departments 224:15 225:10 225:13 340:8	depend 62:10 166:16 248:5 depending 78:4 91:15 166:17 185:14 186:13 307:21 depends 222:3 327:13 deploy 272:16 deponent 83:23 245:5 deposed 8:11 deposition 1:15 2:2 6:14,22 65:11 71:24 72:4,7,10 73:24 102:13 114:18 120:18 152:11,16 171:6,10 196:3 196:24 198:23 199:23 218:11 233:1 239:7 262:7 265:24 275:8 299:19 305:8 328:9 334:17 337:3 342:4 depositions 8:17,21 72:23 73:25 74:6,18 74:21 75:9 200:15 202:5	deprive 38:23 42:23 236:4,8 311:20 deringer 4:18 describe 31:3 67:12,21 314:25 described 133:9 147:3 148:19 227:16 231:17 244:24 303:7 333:24 336:22 description 30:21 60:19 61:18 256:15 282:24 303:9 304:6 305:25 design 248:24 designated 47:22 70:17 designed 242:13 243:13 291:4 despite 241:11 destroying 231:2 destruction 14:11 detail 56:8 details 49:15 119:24 181:10 304:12,22 310:19	determination 27:18 35:18 46:14 99:5,8 102:17,20,21 173:18 determinations 165:13 determine 20:25 21:12 36:25 46:8,16 46:24 47:5 73:23 98:16 140:13 173:7 173:24 197:25 204:22 210:11 determined 321:13 determines 267:15 determining 25:25 107:12 206:11 develop 257:5 272:16 developers 265:14 development 293:3 devices 54:23 55:2 56:5 dialogue 293:2 difference 41:21 192:8,19 285:13
---	--	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[different - district]

Page 21

different 22:8 28:14 34:7 45:7 66:16 74:4,20 77:16 77:17 78:4 81:16 82:2 90:20 91:3,14 92:2,3,4 105:25 106:16 110:20 133:23 206:14,16,16 207:16 211:20 212:24 221:5 224:3 231:6,7 239:20 249:9 258:21 261:20 265:23 266:25 285:20,22 287:15 288:17 299:20 313:5 314:20 326:25 327:8 difficult 139:19 139:22 140:6 140:14 141:16 199:17 233:16 276:4 330:19 difficulties 291:25 digital 314:22 direct 8:9 123:11 161:11 216:9 339:3	directed 122:21 122:24 123:12 211:18 333:14 directing 40:8 45:14 118:2,9 118:20 direction 140:15 directions 141:18 directive 136:16 directly 282:21 disabled 257:17 258:11 disabling 258:15,22 disagree 162:16 169:19 170:23 238:16 239:13,19,21 276:1,3 288:25 320:19 disagreed 291:11 disagreeing 35:14 238:17 disagreement 147:15,25 disagrees 78:12 discard 249:16 discarded 243:7	disclose 49:5 128:14 129:14 315:25 disclosed 316:10 disclosing 304:11 discovery 120:14,14,17 120:17,19,19 120:19 192:20 215:14 223:21 225:6 287:13 288:5,20 291:7 293:5 295:14 295:24 296:2 discretion 147:11 discuss 99:10 115:15 discussed 32:19 156:23 300:8 300:10 305:23 307:18 333:19 discusses 87:16 89:20 discussion 90:20 117:5 156:7 257:22 271:9 325:13 discussions 228:21 232:8 260:1 294:19 296:10 299:4	311:2 display 174:15 175:5,9,21 176:1,9,16,21 176:24,24 177:4,12 178:14 179:7 179:10 183:15 184:14 186:20 187:12 189:5 189:12 263:25 displayed 264:14 disproportion... 190:18 dispute 87:18 287:6,18 disregard 318:12 disrespectful 188:15 201:19 disrupting 311:7 distinction 249:25 250:22 250:25 251:21 252:7 distinguished 244:18 distracting 296:12 district 1:1,2 6:18,19 52:19
---	---	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[ditto - earlier]

Page 22

ditto 47:8	97:23 98:3,9	double 44:21	36:22 37:5,12
division 1:3	98:25 102:11	doubleclick	131:4 132:18
6:20	102:12,13	181:16 182:12	137:2,12
docket 6:20	108:10 115:8	182:25	162:17 163:3,5
docs 321:18	146:22 152:24	dr 195:2	174:20,25
document 28:8	153:12,16	196:24 197:5	175:6 178:13
39:16,17 40:23	168:5 172:17	197:19 200:10	178:16 190:24
43:10,13,14	174:20 175:1	202:4 320:12	236:21,24
44:4,5 56:14	178:22,22	draft 284:5,10	237:8,10 243:5
63:15,18,23	179:10 180:16	drafting 57:14	243:8 312:17
64:3,9,10,14	180:25 183:24	74:2 198:6	e
78:20 83:24	192:1,4,4	draw 46:25	e 3:1,1 4:1,1 5:1
97:21 116:12	198:5 200:23	235:16,17	5:1 8:5 15:18
145:20 146:19	202:6 206:11	drawing	16:3,21 17:22
168:12 172:6	207:2 214:24	171:17	18:24 19:13,25
191:18 214:15	217:13 229:13	dreyfus 59:19	20:14 21:10
218:15 243:1	231:7 252:22	61:13	167:19 168:10
244:16,24	265:24 267:18	driven 249:11	169:20 171:1
245:6 250:6	277:15 282:22	dropdown	224:1 226:10
253:23 278:9	293:24 295:25	260:14	227:2 229:1
279:2 282:5	309:21 313:18	due 184:25	235:15 236:22
283:9,12,15,19	321:3,23	duly 8:6	338:1,1 339:1
284:5,9,10,21	327:14	duplicative	339:6
284:24 285:6	dogs 171:23,25	252:19	earlier 34:23
298:5 299:13	172:6,13,18	duration	36:25 47:12
300:14 314:1	173:19	130:10 301:16	95:9 110:19
340:22	doing 24:23	duties 15:3,6	130:2,18
documents	28:12 56:2	132:6	145:23 167:16
43:3 44:24	69:20 209:13	duty 14:13	199:23 211:5
45:25 54:10	303:24	27:11,20 29:8	213:22 214:13
55:2,5 73:1,4	doj 241:14	29:10 31:5,12	226:3 233:8
73:20 74:6	256:1,3,11,18	32:21 33:23	239:11 257:23
75:20,22,25	dollar 268:2	34:18,23,24	267:1 268:8
76:1 95:13		35:11 36:13,22	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[earlier - employees]

Page 23

275:2 278:21	87:23 88:7,10	either 57:6	274:18 331:8
279:9,23 280:9	88:12,17 94:18	69:22 118:6	340:4
288:9 291:11	98:2,10 102:16	153:12 178:19	emails 84:14
292:7 294:7,8	103:2 110:22	324:18	99:14 152:14
309:18 333:20	131:6 133:6,21	electronic	174:18,19
early 175:8,14	133:22 134:8	30:18 123:17	206:11 210:11
177:8 178:19	134:13 135:14	145:19 172:17	215:10 229:8
211:4 249:15	140:9,12 165:7	191:9,17	260:24 261:1,9
250:14 287:8	165:13,15	217:20 225:5	264:23,24
287:19,24	198:13 203:17	227:6,18 291:5	employ 276:22
288:6,21 291:9	203:18 204:16	302:12,25	employed
295:1 296:9	204:17 206:8	317:2	244:25 329:22
ease 291:25	206:15,19,24	electronically	employee 91:25
easier 28:15	207:19 208:1	15:23 147:20	100:20 138:11
205:15 281:17	208:13,18,25	148:6 227:5	142:1,15 143:9
easily 192:5	209:6,11 237:6	element 18:25	143:20 191:24
279:14 281:13	249:5 268:25	20:6	199:19 260:25
eastern 1:2	289:11,15	elements 16:3	265:5 266:22
6:19 52:19	291:1 292:25	16:21 20:23,24	267:14 301:14
easy 279:7,9	315:11 316:18	21:10 247:10	303:15 333:5
303:13 304:7	329:6 332:11	elisa 4:15 7:19	333:13 338:16
eating 164:18	340:24	else's 268:14	338:19
economies	edition 144:21	email 40:10	employees 40:9
249:19	145:3,6 225:24	41:8 42:9	45:15 80:14
ediscov 186:6	339:23	43:14 44:6,17	84:18,25
ediscovery 10:1	education	44:23 45:6,17	100:10 101:5
10:25 11:12	204:10	117:8,9 147:12	101:25 103:4
23:2,21 24:2	effect 99:8	191:17 214:5	113:8 118:10
25:2,9,13,18	101:3 153:9	214:11 215:3,5	118:20 122:7
26:1 28:8,22	effective	215:6,9 216:13	122:14,21
29:6,11 34:6	155:12	217:18,21	123:7,16 124:1
37:2 38:1	effort 295:15	218:10 231:5	126:4,19
63:21 65:23	efforts 190:3	252:19 259:23	127:20 129:11
67:20 87:17,22	241:24	267:9,11	136:4 137:1

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[employees - estimate]

Page 24

138:2,18 139:4	ends 182:19	ephemeral	42:3 46:9 49:7
139:11 140:6	enforcement	124:24 125:8	54:4 55:15
140:14,19	256:2	130:3 136:9,20	64:13,19,24
141:1,17 144:3	engaged 69:17	137:20 141:23	106:6,22 107:7
144:14 146:21	98:12 158:15	237:19 238:8	107:13 134:18
147:6,11 148:9	engagement	240:2,8 241:1	148:12 149:13
148:10 149:1,7	71:16	241:12 242:2	151:9,14,23
149:10,12,23	engagements	242:12 243:6	178:14 179:6,9
149:24 150:2	49:2	243:17,22,24	183:13 190:8
157:1 183:10	engineers	244:5,15,18,19	190:16 223:19
192:9,21 193:7	274:15 275:9	244:20,21	224:2 226:13
196:17 197:25	275:17,20	245:1,12,16	226:18 287:7
199:4,8,18	enhance 251:12	246:8,9,16,18	287:18 288:5
201:10 205:20	enron 32:13,15	246:24,25	288:20 291:7
215:23 216:20	163:13	247:11,13,22	293:21,25
223:15 227:24	enter 11:8	248:12,14	295:2,12
228:15 230:6,7	entered 311:5	249:18 252:5	296:11 304:21
230:15 232:25	entertain	252:13 254:1	310:21 311:4
257:12 258:25	164:12	254:18,23	311:11,17
261:2,15 263:6	entire 73:22	255:3,9,14,17	312:8,10,21
264:5 266:7	176:6,9 207:22	256:4,13 257:6	313:6,11,20
267:11 269:16	208:16 228:23	257:13 258:15	315:2,9,25
269:20 270:3	232:22 264:21	340:15	326:9,25
272:2 273:1	269:3 278:22	equal 312:20	327:11
274:22 275:11	279:2 334:11	313:21 315:2	esq 3:8,10,16
282:18 286:8	entirely 67:1	equally 251:12	3:22 4:5,13,15
300:19 303:13	182:15	erased 193:16	4:22
306:3 317:23	entities 64:8,13	errata 343:1	established
318:20 319:23	entitled 289:11	esi 15:23 18:1,8	34:17 145:23
enable 147:4	340:24	18:15 19:1,8	establishing
encourage	entity 52:9	19:14 20:7,15	92:3 295:3
232:24	64:18,21	22:16 24:2,7	estimate
encouraged	106:13 161:5	24:21 28:3	208:22,25
227:24 288:10	326:16 327:4,5	30:19 41:16	266:20

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[estimates - exhibit]

Page 25

estimates 207:1 208:3	214:17 228:1 229:24 230:9	184:17 192:7 203:23 207:1	58:16,18,19 65:10,12 72:16
et 1:6 3:4 6:15 45:15 264:1	231:2,8,14,18 232:12,21	222:9,12 236:12 245:15	76:18,19,22 77:3 85:5
eternity 237:25	234:18 311:19	252:17 307:24	114:17,19
ethan 3:22	311:21 318:12	308:4	115:9 144:24
ethan.glenn 3:23	319:19	examples 22:14	144:25 155:3
ethics 66:6	evidentiary 45:22,23	31:1 85:14	167:10,11,12
evaluate 147:17 243:15	ewulfsberg 4:16	116:22 118:8 118:19 140:25	174:10 178:3 195:13,16,21
evaluating 241:23	exact 97:21 101:22 188:4	153:3 260:22 302:17	196:2,2 214:4 214:5,11
event 133:17 136:15 161:23	259:15 261:12 263:11 266:8	exceeded 199:1 except 128:18	223:24 224:13 224:14,19
162:9 166:8,9 166:18 174:2	267:13 291:15 316:14 318:23	213:4 exception 327:1	234:3,10 237:17,22 238:7 239:25
184:18 187:17 189:9 285:12	exactly 74:22 150:25 292:12	excerpt 152:19 excerpted 259:15 277:21	258:23 259:9,9 259:10,14 273:5,9,12
309:23	examination 8:9 328:4	278:10	281:7 283:13
events 146:9 168:21 174:12	338:5 339:3,4 examiner 51:5	exchanged 295:25	283:14 284:16 289:9,10
174:12 175:2 180:23 181:9	51:14 52:21,24 53:8 55:19	excluding 195:24	297:17,18,23 297:23,24
188:24	59:25 60:10,14	excuse 210:12 214:24 262:11	305:3,3,8,9 309:25 328:10
everybody 205:25	example 17:8 31:10,13 67:5	334:24	328:16 329:1 330:16,22
evidence 12:14 12:17 14:12	75:12 80:13 106:8 107:2	exemption 327:7	331:19 336:1 339:7,9,11,13
15:13,18 16:9 22:11 29:2	115:19 116:7 117:1 118:1,4	exemptions 326:13,15	339:16,18,20 339:24 340:1,4
33:3 38:24 42:24 162:17	125:14 154:10 173:15 181:14	exhibit 39:20 39:23 52:12,13	340:7,10,13,17
162:21 163:2,9			

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[exhibit - failed]

Page 26

340:19,21,23 341:1,4,4 exhibits 77:13 195:25 235:24 277:10 337:4 existence 293:25 existing 49:16 expanding 176:20 expect 190:6,14 215:17 293:23 expected 193:16 expensive 265:13 experience 23:1 37:4 59:11 79:20 84:13 86:4 89:22 92:24 94:17 96:11 97:22,25 104:5 119:13 119:16,22 124:12 181:24 208:18 267:8 286:2 312:8 315:8 expert 12:22 13:13 21:1,12 26:1,19 28:1,6 28:7,16 29:1,6 31:5,11 33:10 37:2 39:18,23	47:23 48:1 70:9,13,19 75:14 76:22 101:4,17 158:12,25 197:3,6 203:17 204:13,15 259:11 265:17 274:14,16 275:15,20 328:11 329:6 332:11 339:7 339:16 340:18 expert's 70:21 expertise 32:20 33:21 34:11 36:11 102:16 104:17 108:16 108:22 140:9 140:13,20 141:7,13 195:9 278:3 329:5 experts 71:5 239:13 274:1 explain 53:7 79:17 explained 78:15 79:15 explains 170:20 explanation 272:20 325:11 explosion 291:5 express 256:4 329:9,16	335:22 336:18 expressed 328:21,25 337:7 extension 48:17 extent 107:7 146:9,11 163:24 164:10 170:22 180:20 181:1,7 external 126:16 286:13 293:2 extrapolate 206:9,22 207:21 208:15 209:8 extrapolating 202:17 208:2 eyes 1:14 111:14 322:13 f f 106:10 288:13 288:14,16,19 289:1,4 292:4 294:5 310:14 310:20 316:19 316:25 338:1 face 118:3 facilitate 293:4 facilitates 248:22 facing 221:15	fact 11:22 16:18,19 19:8 36:24 46:13 58:24 100:14 102:5 113:16 120:14 134:24 147:9 151:17 158:5 180:21 181:8 183:9 191:16 198:17 199:3,10,13 232:16 240:10 262:19 280:7 284:4,8,20 298:3 303:12 315:18 316:23 322:4 325:9,11 fact's 46:15,22 factfinding 54:6 factors 34:7 185:16 198:4 198:22 221:5 222:4 232:10 248:3 334:15 facts 216:8 329:15 factual 272:20 faculty 30:14 68:5 failed 18:8,13 18:13,20 19:2 22:15 38:13,22 39:12 42:12,16
--	---	--	---

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[failed - firm]

Page 27

46:8 55:15	218:10 234:14	federal 15:18	files 194:13,23
311:19	238:6 253:5	17:8 19:19	267:19
failing 22:11	285:20	151:2,8,12	final 311:4
fails 38:5	familiarity	167:13,17	finally 9:11
failure 15:22	166:25 169:12	169:25 170:3,4	19:12 64:5,6
19:9 41:16	familiarize	170:7 224:1	financial 106:8
226:12 316:24	152:9	226:11 288:3	106:17 282:7
fair 24:9 45:1	far 44:7 45:25	289:6 291:3	282:15 283:24
49:20 61:18	48:12 50:5	339:25	financially 7:7
73:16 88:14	86:19 88:9	fee 146:7	338:21
97:5 104:8	119:10 187:3,5	feedback 274:8	find 40:9 45:15
134:9 174:4	215:23 228:7	274:15 275:9	49:9 57:23
223:17,22	244:3 246:23	275:16	74:5 195:14
227:13 237:12	264:18	fewer 267:17	228:15 234:1
246:17 256:15	fast 156:5	field 10:1 23:2	250:21 251:19
290:1 303:4	fcpa 256:1	29:6	252:6 330:19
335:23 336:2	feasibility	fifth 28:2,9,17	finding 54:10
fairly 8:19	270:25	28:23 32:6	272:2
faith 144:2,13	feasible 138:24	163:13	findings 53:25
146:21 147:5	274:25	figure 166:20	55:11 101:24
147:13 148:10	feature 245:15	173:14 175:12	102:4 198:16
148:16 149:1	271:15 283:25	300:7	fine 213:18
149:10,23,23	284:21 285:1	figured 63:9	253:19
190:3 227:4,17	features 126:15	205:17	finish 9:9 85:21
fall 114:13	265:25	file 192:7	finished 21:4
187:17	february 199:7	194:15,23	95:16
falls 90:18	235:3 272:12	326:17	finra 106:9,12
190:25	275:2 279:8,15	filed 6:17	282:23 284:22
false 272:23,25	279:19 281:22	162:21 163:8	284:25 285:21
familiar 15:17	286:15 297:19	167:1 169:13	firm 4:2 7:3,20
22:19 144:18	298:3,4 305:11	179:19 180:1	7:24 51:18
144:19 152:6	305:18 309:24	183:19 297:23	59:15 63:20
171:5,11	321:11 322:17	299:7 310:6	68:22 69:1
193:13 213:1	322:18 341:2		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[firms - form]

Page 28

firms 31:17 61:23 62:4 68:15,19 first 8:6 17:25 26:5 27:8 51:8 59:23 60:2,4 60:16 96:3 110:11 166:2 173:10,12 211:1 240:25 241:8 242:24 243:3 245:19 253:24 257:10 276:8 289:21 290:24 293:12 293:18 295:9 298:16 299:2 299:24 326:14 fits 247:21 five 30:12 59:6 59:7 68:10 149:17 194:1,7 207:7 321:8,25 322:14 fixed 233:11 fixing 171:23 172:13 173:20 flip 213:24 flipping 87:3 focus 235:8 249:13,24 295:23 312:9 324:2	focused 32:5 47:18 250:12 folks 24:12 50:7 69:10 91:14 99:8 100:23 102:21 119:6 126:1,16 127:3 200:15 216:12 219:7 219:21 227:17 230:8 251:20 271:1,5 282:2 326:4 follow 101:20 101:25 148:11 149:10 followed 14:23 54:25 80:16 84:18 86:12 112:22 113:8 165:14 229:11 following 23:25 24:19 69:23 79:9,23 84:25 115:14,22 124:16,18 162:16 182:5 240:24 247:9 247:12 343:1 follows 8:8 78:12 followup 300:13	footnote 43:14 77:5 79:10 96:9 115:4,6 154:19,21,23 214:16 283:8 294:8,10 324:9 force 126:18 277:1 288:5 289:1 291:8,12 forced 283:5 303:25 321:10 321:11 forcing 288:20 forecloses 316:25 foregoing 338:10 342:3 forensic 51:5 51:21 52:6,21 53:8,23 54:25 55:19 59:25 60:10,14 forever 220:14 230:25 231:19 forgot 56:16 61:12 239:11 forgotten 56:17 form 11:10 13:11 15:15 16:5,23 18:3 18:17 19:5,17 20:11,18 21:3 21:15 22:3 23:8 25:4,21	26:3,11,23 27:16,22 28:5 28:20 29:4 31:8,14 32:7 34:2,21 35:16 36:7,17 37:16 37:23 39:8 40:7,19 41:5 42:6 43:2,8,23 45:3,13 46:11 46:20 48:25 49:22 53:11 58:7 61:7 62:6 67:15 70:11,25 73:18 75:11 78:1 81:21 83:14 85:12 86:22 87:6 88:19 90:25 91:21 94:11,14 94:21,23 95:8 96:6,21,25 97:10 98:7 99:16 101:14 102:19,25 104:2,21 105:7 105:17 106:15 110:5 111:1 116:10 120:4 120:23 121:8 122:10 124:10 126:6,21 129:5 129:25 130:22 131:23 132:14
--	--	---	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[form - general]

Page 29

135:4 136:7	234:21 235:19	103:12 217:18	fulbright 2:5
137:16 139:16	236:14 237:1	217:20	3:5,13,19 6:23
140:9,23	239:17 244:2	forth 71:4	7:23 68:23
141:11 142:7	250:3,17	83:20 84:4	full 19:20 91:22
144:7,15	251:25 258:19	258:21 329:17	121:5 241:18
147:23 148:13	264:16 270:8	337:4 338:14	242:24 257:10
149:15 150:18	271:8,12 272:4	forthright	290:24 293:18
151:4,10	276:2 279:11	293:1 296:19	293:25 295:21
152:21 154:17	279:17 280:4	foul 255:9	fully 215:18
155:7 158:3	282:20 286:11	found 94:2	314:14 315:25
159:9,20,25	287:10 288:8	97:22 102:3	functionality
160:14 161:10	288:23 296:15	140:25 153:13	276:12,21
162:1,24	302:20 304:16	153:15 159:4	further 9:1
163:17 164:5	306:23 309:8	198:14 259:20	100:1,21 152:5
164:15,17	311:23 312:7	foundation	184:16,24
165:3,11 166:1	312:24 313:13	34:24	257:22 299:16
166:14 167:4	313:24 315:16	four 20:23	305:23 337:11
168:3 170:2,9	316:12 320:7	254:19,24	338:9,15
170:16,21	323:24 326:20	fourth 168:19	g
172:2,21	329:11,16	219:11	g 8:5,5
174:16 176:8	330:4,10 331:3	frcp 168:10	gaining 315:20
177:15 179:8	332:14 333:12	frequency	gamesmanship
183:1 184:9,19	335:7,13	200:16	296:3,12
185:12 186:9	336:24	freshfields 4:18	gears 152:1
188:20 191:3	formal 204:10	freshfields.com	189:25 193:24
191:11 192:12	formed 69:25	4:23	213:12 287:3
192:24 197:14	329:5	friendly 216:12	gelardi 53:16
201:2,5,18	forming 44:24	front 20:3	91:24
205:8 206:23	167:21 168:13	23:11 102:10	273:6 340:20
209:17 210:19	238:3 329:22	314:12	general 11:24
211:17 214:19	forms 36:4 90:3	ftc 93:9,11,20	80:10,21 81:8
220:2 228:2	92:15 93:13,22	95:1,9 137:19	84:11 100:5
230:11 231:4	95:5 96:18	181:22 182:6	104:16 105:1
231:22 232:20	97:15 98:19		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[general - going]

Page 30

108:19 132:18	267:23 268:2	184:20 187:22	100:11 101:20
133:12 135:11	269:7 319:9	189:23 196:4	103:8 114:5,16
176:2 178:17	given 25:14	199:25 200:6	116:25 125:3
181:25 182:1	37:12 80:14	208:6,7 213:23	135:25 137:6
298:17 306:15	105:2 120:17	217:15,16	137:11 141:19
general's	140:15 174:2	226:5 227:24	149:11 156:5
299:12 305:13	207:6 208:4	234:1 235:20	165:18 166:3
generalized	209:21 221:1	240:18 245:9	169:7,18
94:7 326:3	221:12 230:5	249:3 251:4	177:19 183:3
generally 66:20	311:12 335:16	253:20 254:14	183:17 190:12
76:11 80:3,9	gives 116:21	256:21 265:11	195:12 200:6
81:4 83:12	192:20	269:15 270:1	205:14 211:16
84:7,9 85:8,18	giving 165:6	273:13 274:6	212:10 213:11
86:18 105:9	gleaned 319:3	285:16 290:14	213:13,21,23
114:14 117:24	gleaning 96:23	299:9,16 304:3	214:3 217:10
119:22 148:1	154:11	304:12,22	217:23 222:23
152:5 267:9	glenn 3:22	307:3 318:10	230:21 232:13
330:2 335:21	global 61:16	320:23 330:20	237:15,23
georgetown	globally 31:19	334:18 335:14	240:22 245:7
10:6,8	go 6:12 8:25	goal 134:15	248:7 250:20
getting 163:19	9:21 15:8	232:6 294:20	251:8,19
173:11	30:13 43:24	goes 143:4	253:18,20
gibbs 4:9 7:17	51:2 56:8	251:7 302:4	256:21 267:17
gibbsbruns.c...	59:22 72:15	going 6:2 9:7	274:6 275:5
4:14,16	75:12 76:5	15:23 19:18,18	278:1 280:20
give 20:4 33:16	77:7 80:19	20:1,2,22	281:5 282:16
83:22 91:22	92:9 94:25	28:12 29:19	287:3 288:15
95:6 119:24	95:24 97:11	32:15 33:17	290:11 291:10
154:2 171:18	112:1 115:11	39:19 41:11	293:5,16 294:2
184:17 187:14	117:15 121:19	49:13 52:10	297:16 300:23
203:3 205:2	125:22 134:3	56:8 63:5 65:4	301:3,8,17
226:16 245:3	145:5 152:5	65:9 76:17	307:2 312:5
261:10,12	156:4,13 157:6	92:23 95:24	315:1 319:7
266:8 267:13	161:13,17	96:11 99:25	323:1 326:14

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[going - governance]

Page 31

326:17 327:24	118:1,9,20	264:6,20 265:3	331:2,6,11
333:21	127:16 139:9	265:14 266:1,6	332:3,7,12,13
good 6:1 8:1	140:6 141:1,16	266:10 267:10	332:16 333:5
144:2,13	152:2 153:23	267:15 268:10	340:11,22
146:21 147:5	159:22 174:13	268:16 269:2,8	google's 14:17
148:10,16,25	175:3,18,19	269:11,14	15:3 19:9 38:4
149:10,23,23	176:5,10,13	270:1,11,18,20	38:13,17 40:16
190:2 203:23	178:13 179:6	271:4,17,24	41:14,18 43:6
227:4,17	179:23 180:11	273:16 274:10	43:10,21 44:25
235:22 266:11	180:21 181:8	274:17,18,18	78:13,16 79:13
281:4 317:11	183:6,9,13	275:1,20	79:15 80:2,8
google 1:9 4:8	184:12,15	276:10,11,13	81:2,9 82:11
6:16 7:17	186:18 187:10	276:16,18	84:6,11 85:7
11:17 12:13,16	187:18 189:10	277:5,11,22	85:17 86:11,15
13:8 14:23	190:21 194:6	278:6 279:4,14	88:16 89:15
15:6,12 16:8	196:17,19	279:18 280:1,9	91:11 109:18
18:7,20 21:25	197:25 198:10	281:13,20	110:10 126:7
32:23 33:3,25	198:18,19	282:6,8,14	127:19 155:22
38:21 39:2,12	199:4,5,7	283:15,24	156:16 177:12
40:5,11,21	201:10,12	284:6,16,25	190:24 232:23
42:12,16,23	209:12 210:7	286:3,7,14,16	244:25 245:21
44:15,16 45:11	210:12,15	286:19 296:24	245:22 246:13
46:2,3,8,17	211:1 212:16	297:4 298:13	247:20,25
47:7 76:10	216:11 218:23	300:3,18,21,21	280:14 299:5
80:15 84:17,25	218:24 227:23	301:2,21	299:10 300:13
86:3 90:7,12	228:9,14	302:11 303:6	300:17 302:10
90:13 91:24	230:15 231:9	306:1,2,20	305:14,19
99:21 100:9,24	231:10 232:1	310:1 312:25	306:21 316:10
109:20 111:6	233:12,13,14	313:17,21	gotten 22:10
111:18 112:7	234:4,11,12	314:7,20	141:21 212:9
112:14,21	235:5 236:13	317:23,23	222:14
113:4,8,12,24	251:1 260:3	318:15,19	governance
115:19 116:16	261:15 263:6	319:14,23	76:9 78:14
116:20 117:13	263:24 264:3,4	320:10,15,16	79:14,19 81:10

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[governance - hearing]

Page 32

84:12 86:2	328:5 330:13	guidance 80:14	hangout 299:12
88:2 89:21	338:6 339:2,7	80:16 95:10	300:14,22
90:6,12,16	339:8,9,11,12	96:15 103:6	301:7,15,24
112:20 248:20	339:13,14,16	109:16,21	302:15
249:5	339:18,20,24	133:19,21	hangouts 116:3
governing 29:8	340:1,2,4,7,9	134:11 135:11	299:21 300:21
32:21 33:22	340:10,13,17	137:4,8,9,18,19	306:1
government	340:19,21,23	146:15,16	happen 272:11
161:7 171:20	341:1,4,5	223:9 238:14	315:17,23
176:15 187:1	342:6	240:2,5 268:25	happened
241:22	great 235:4	guide 134:16	98:25 110:3
governmental	greater 75:5	guided 228:14	123:9 182:24
64:8,12,18	333:2	guideline	230:25 256:10
327:10	greenwich 4:20	253:24 254:15	256:16 272:12
governs 226:12	ground 247:19	257:1	happens 166:8
grande 1:16 2:3	257:12 258:5	guidelines	182:18
6:14 8:10 9:25	groundrules	243:12 253:21	harbor 227:2
39:23,24 51:17	295:4	guys 327:21	227:16
52:13 58:19,20	group 29:24	h	hard 290:4
59:23 65:12,13	52:25 133:18	h 107:3 339:6	header 154:5
72:22 76:22	133:25 145:11	hacked 222:13	heading 76:7
78:19 79:4	145:12,14,15	halfway 219:13	153:19 317:16
114:10,19	145:18,19,24	hand 39:19	323:8
144:25 156:10	205:5 230:6	65:9 114:16	healthcare
167:12 177:25	269:21 278:20	184:1 224:12	107:1
195:16,17	322:14 325:18	237:16 297:16	hear 17:2 60:15
214:5 219:2	groups 133:23	315:20	85:9 105:15
223:3 224:14	228:24 252:20	handed 146:19	201:23 270:9
224:16 234:3	270:9 283:1,1	234:9 237:22	276:23
237:17 249:23	growing 241:11	handing 20:8	heard 11:16
259:10 273:5	growth 249:10	167:18 273:9	200:10,14
280:25 283:14	guess 202:23	289:8	337:2
289:10 297:18	288:24 290:21		hearing 37:14
302:2 305:3,4			44:12

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[held - hold]

Page 33

held 2:4 28:25 316:23	103:25 104:10 107:21 108:5,9	303:25 304:7 309:21 321:11	116:7 117:6,15 118:3,11,13,22
help 21:1,12 50:7 134:16 163:14 181:11 218:21 228:3 243:13 245:2 278:8	108:11 113:10 116:2 117:19 119:2 126:10 126:18 139:13 140:4,5,10,20 141:3 143:1	323:13,14 324:6,22 325:12,23 326:5 333:7,14 333:20 334:9 334:13,17	119:7,24 120:25 122:4,8 122:16,17,23 123:1,7,17 124:2 125:12 126:4,12 127:4
helpful 216:6 240:18	195:5 196:20 198:2,10,19	hit 216:22 260:14 322:8	127:22 128:8 129:11 130:9
helping 235:8	199:6,9,16,18	hochstetler 72:8 78:18	130:11 131:15 135:22 136:3
hereinbefore 338:14	199:20,25 200:20 201:4	79:12 158:17 158:24 194:19	136:14 137:22 137:22 138:1,3
hesitant 148:15 148:15	201:13 202:12 205:22 210:13	195:2 197:5,19 199:3 205:12	138:11,18 139:12 141:18
hey 109:25 251:20 285:1 312:4	219:22 229:10 232:24 233:3,6 233:10 245:23	205:16 207:6 207:15,20 208:14,21	142:2,16 143:10,21 144:5 148:11
hicks 4:22	246:2,14 259:4	320:14 322:16	149:2,12,13,22
high 322:5	260:4,11,17,20	hochstetler's 158:21 196:24	157:2,21 161:4 173:2,4,23
highly 1:13 298:22,23	260:21 261:4,5 261:21,25	197:8,22 198:8 200:10 201:8	175:7 183:23 184:6 185:10
hindsight 166:24 169:11	262:7,8,11,12 262:14,15,17	202:4 212:20 318:12 320:13	185:19 186:4 186:15 193:10
hipaa 107:3	264:8,9 265:7	hold 22:25 29:5 35:19 50:13,20	196:17 198:1 204:12,14,20
hire 109:20	269:17,22	83:3 99:9,11 99:21 100:11	206:1 219:8,15 219:16 220:13
hired 11:23 12:3,9 15:10 26:6 109:24 158:15 204:22 205:2 206:5	270:4 271:7 272:3 275:12 276:25 277:1,9 281:20 282:9 282:10,18	101:19 103:13 112:23 114:12 114:20,25 115:13,16	220:24 233:6 253:11 257:14 257:19 258:13 265:5 266:7,22
history 35:23 39:13 42:17,18 82:15 83:5,7,8	283:5 284:14 285:3 286:9 303:14,15,22		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[hold - inability]

Page 34

271:6 272:1	hot 171:23,25	identification	implement
273:18 274:23	172:6,13,18	40:1 52:16	180:21 181:8
275:11 276:22	173:19 216:7	58:22 65:15	implementati...
281:21 286:8	hour 9:3,5 63:5	76:25 114:22	163:23 252:14
301:14,17,22	112:3 166:2,4	145:4 167:15	implemented
302:6,11	213:13 278:1	195:19 214:9	161:4 229:12
308:11,18,21	281:2	224:18 234:7	implementing
309:10 332:23	hours 71:8,12	237:21 249:16	286:17
339:19	199:24 262:7	250:14 259:13	implicate 87:22
holding 25:7	271:18 272:16	273:8 283:17	88:12
holds 50:8,14	332:1 334:18	289:13 297:21	implications
100:20,23	houston 4:3,4	305:7	274:9 275:23
101:6 102:23	4:12	identity 247:3	important
117:25 119:17	hubbard 61:25	ig 249:5 251:9	24:17 166:23
121:6,15 126:9	hughes 61:25	254:19	169:10 279:25
128:22 144:21	hum 202:19	ignatius 1:16	287:6,13,17,23
145:2 146:23	203:9 273:14	2:2 6:14 39:24	295:13 296:24
148:24 153:25	319:10	58:20 65:13	311:17
154:14 155:5	hundreds	195:17 224:16	impose 15:21
155:11,18,22	198:25 207:21	305:4 338:6	226:17
156:9,16,22	208:15 271:18	339:2,8,12,14	imposes 17:24
157:10,18,21	272:16	340:2,9 341:5	impossible
159:6,13,19,22	hypo 172:9	342:6	123:7,16 142:1
160:4,21	hypothetical	image 55:1	142:15 143:9
163:23 180:22	171:18 172:3	259:7,10,15	143:20 151:18
181:9 185:22	172:15,23,23	340:17	151:20 199:18
216:10,13	173:2	imaged 53:17	improper 16:16
267:12 299:13	i	54:22	164:25 165:4
339:22	icon 260:19	ime 52:14	230:23 255:4
homestretch	262:3	53:16 339:10	255:18
281:1	icons 263:15	immediately	improperly
hope 134:24	idea 229:10	308:25	314:22
hopefully 328:6	244:7 300:1	impact 99:12	inability 271:7
		254:24 323:15	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[inaccurate - information]

Page 35

inaccurate 68:8	incomplete	334:12 335:19	inference 47:1
inadequate	318:17 319:18	industries	226:16 235:16
317:1	320:18	83:18 105:21	infinite 211:11
inadvertent	incorporated	105:24 106:4,7	infinity 183:12
218:21	207:10	107:15 132:19	184:7
inadvertently	incorrect 76:12	industry 16:9	inform 27:19
261:25	112:10 154:1	17:1,5 23:23	information
inclined 242:1	320:14 323:16	35:2 36:19	15:24 25:8
255:3	324:24	37:10 83:12	33:10 44:14
include 23:24	incredibly	84:8 85:9,19	49:3 55:9 76:8
33:10 70:15	262:4	89:17 93:6	78:14 79:13,18
124:13 134:7	indefinitely	94:2,18,20	81:10 84:12
136:19 157:22	209:16 309:12	96:14,23 97:7	86:2 88:2
176:21 194:10	indicate 97:13	103:24 105:9	89:21 90:6,11
244:11 273:18	indicated	105:12,14,19	90:16 95:20
included 122:4	198:24 303:13	105:23 106:6,9	103:12 112:19
153:3 158:9	304:7	107:2,11,17,24	121:1 141:14
170:24 196:13	indicates 40:24	108:8,14	147:21 148:6
includes 42:16	84:17 157:1	110:15 124:7	166:10,12,19
42:20 168:4	indicating	124:12 127:12	168:21 173:3
243:2 300:20	306:24	128:4 132:15	173:12 179:24
including 40:8	indication	134:7 135:12	180:10,14
45:14 73:6	282:25	138:14,16,21	186:10 191:9
94:3 109:2	indicative	141:24 142:13	191:14 200:3
120:18 124:15	147:12	143:7 144:11	201:6 206:3
125:7 127:21	indicator	146:17 150:1	207:4,6 208:22
137:18 155:9	261:21	171:17 207:17	209:19 210:10
159:11 198:7	indicators	207:18 208:11	222:14 227:4
198:24 201:7	263:23	208:12,18	233:20 235:7
242:14 247:1	individual	209:14 237:18	236:24 237:10
254:7 287:1	147:4,10	238:2 279:5	242:5 248:20
288:18 301:23	148:20 260:23	327:2 340:14	249:4 251:12
302:14 310:19	262:13,16	inevitably	251:13 257:16
336:19	333:1,16 334:8	215:19	264:17 266:12

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[information - investigations]

Page 36

266:14 277:12	instant 81:21	216:18 228:23	320:15
291:5 293:1	95:3 98:24	instructs	internet's
297:5 317:2	104:11 109:10	301:21	266:11,12
information's	109:15 110:1	intend 329:8,12	interplay
236:5,9	111:14 122:15	intended 33:3	254:23
informed 28:22	122:22 123:8	70:20 225:16	interpretation
35:1,6 103:2	123:24 131:14	247:15 291:24	159:12 236:16
215:18 257:5	135:22 137:20	328:20,24	interview 146:4
282:6 283:24	212:8 218:22	intending	introduction
284:13	306:2 307:4	334:9	240:17,19
informing	331:1,9	intent 38:23	244:9,11
284:17	institutions	40:17 41:15,18	introductions
informs 27:18	106:18	41:22,23	241:8
149:12 165:12	instruct 235:17	170:14 231:20	investigated
inherent	instructed	236:4 311:20	273:25
296:18	46:25 99:9	intentional	investigates
inhouse 59:18	122:25 139:10	41:25	187:1
220:6 223:11	333:6	interest 245:8	investigating
225:18	instructing	interested 7:7	187:2
inline 88:16	139:3 192:9	338:21	investigation
inquiries 183:7	251:20	interests	27:13 42:25
183:19	instruction	254:25	99:2 100:3,25
inquiry 161:7	106:23 149:12	interface	171:20 172:12
183:6	219:5 226:17	304:14,23	173:21 177:8
inside 242:5	252:6 301:23	internal 228:9	181:22 182:6
275:20	303:18 308:16	264:20 267:16	182:18 185:14
inspection	instructions	283:14 284:2,5	186:2 271:22
242:10	50:13 84:18	284:20 293:2	investigations
instance 85:22	85:1 100:23	300:20 340:21	39:4 40:6
121:11 133:4	101:19 102:1	internally	45:12 93:15
190:8,16 246:6	102:22 113:9	126:13 264:14	175:25 176:5
296:25	119:9 123:4	271:17 272:7	176:15 179:12
instances 22:15	139:20 148:11	275:1 318:14	180:17 181:13
	149:22 156:8	319:15 320:11	181:14,19

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[investigations - key]

Page 37

182:3,11,12,25	35:13,23 55:9	item 325:21	justice 240:7
183:18 188:9	148:2 160:20	j	k
188:16,17	164:23 188:13	j 319:7 342:1	k 51:10 174:12
189:1 214:18	209:10 211:1	jacinto 3:20	188:24 189:4,8
investigative	220:19 222:4	jaffe 5:4	keep 20:22
100:4 179:20	233:12 242:21	james 3:8	23:17,18,23
179:22 180:6	294:23 296:21	james.renard	59:2 119:25
183:21 299:6	329:8	3:9	120:1 129:10
involve 49:2	issued 13:18	jim 7:21	164:21 178:13
54:1 55:14	36:1 89:7 95:9	job 1:24 46:7	192:9 193:7
121:25 188:25	99:21 100:4,9	46:16,23 47:4	211:9,16
314:1	114:13 138:9	54:21	213:20 217:8
involved 25:10	145:7,15	johns 30:5,8,13	230:8 237:7,7
25:13 48:13	159:22 164:2	65:24,24 68:2	249:4 255:15
55:3 57:17	180:6 189:16	68:6	301:13 308:9
64:23 69:3	238:10 239:25	jonathan 5:4	330:19
82:23 98:23	240:9 244:8	jordan 36:14	keeping 24:19
99:2 104:6	292:18	judge 31:13,22	139:5 209:14
110:7,22	issues 24:1 34:6	31:23 32:22	212:10 229:10
121:14 127:14	47:11 64:13,14	33:24 36:14,15	231:17 332:17
146:9 166:16	132:1 133:22	135:9	keeps 132:21
177:5 179:11	133:23 140:4	judges 133:4	keller 69:5
185:15 300:4	152:15 178:17	134:25 135:15	kent 43:17 44:7
involves 299:4	183:14,20	241:22	214:6,11
314:19	188:10 198:13	judgment	330:15 340:5
involving 189:1	206:16 216:21	79:16	kept 38:7,15
189:11 216:11	220:18 288:6	judicial 133:5	107:7 179:6
287:6,18	288:21 291:8	judiciary 170:4	185:22 210:7
irrelevant	292:25 314:10	jump 241:17	220:14,23
235:11 326:6	315:25 316:17	jumping 257:8	301:7,10
ish 110:21	316:24 317:1	juncture 25:10	331:25
isolate 286:7	issuing 165:5	jury 46:24 47:5	key 254:1,4
issue 21:19,22	240:5	235:17	257:15 318:12
27:14 34:12			

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[key - larger]

Page 38

321:3,17	69:10 77:8	212:18,19,22	known 49:19
322:21	78:16 80:12	212:25 219:20	180:18 227:1
kind 89:20	86:5 87:7	220:16,20	333:2
102:16 131:2	89:19 90:4	223:16 225:20	knows 162:18
151:17 173:15	93:2,24 97:14	226:8 229:4,9	163:6
194:14 206:6	101:20,22	229:12 230:1	I
227:25 251:22	106:17 108:11	233:7 235:22	I 51:10
252:9 260:14	112:18 113:11	238:15 240:13	lack 79:17
274:8 284:10	118:13 119:8	245:2 247:16	laid 111:14
307:21	124:14 127:1,7	256:18 262:3,5	language 39:1
kinds 39:5 76:8	127:10,12,15	263:14,21,22	40:23 95:22
77:17 79:18	127:20 128:2	264:3,7,11,12	97:21 100:15
86:2 90:15,18	130:3 131:9	264:18,20,22	100:18 101:2
119:25 120:1	132:17 136:11	265:7 266:13	116:7,13
161:23 162:9	139:25 141:14	274:21 278:18	118:23 119:23
172:24 173:16	142:21 146:2	286:14 289:3	121:5 139:8
173:18 187:11	150:1,24	290:11 296:17	149:3 157:23
213:7 252:21	153:14,15	296:25 298:11	260:12 288:25
297:2	156:1,3,25	302:22 303:16	291:15 303:3
knew 13:25	160:2,2,5,6,20	310:18,25	312:11,17
14:5	161:14 162:19	311:3,6 312:11	313:15 318:23
know 9:5,14	163:6 164:18	314:2 319:12	lanier 4:2 7:24
21:17 23:13	164:23 167:5,7	319:13,14,20	69:1
27:24 28:13	173:6,8 178:20	322:2,4 324:20	lanierlawfirm...
33:8,9,19 34:5	178:21 179:13	324:23 325:7	4:6
34:10,10,24	180:2,20 181:7	327:12 333:24	large 191:19
35:2,20 36:21	181:10,18,23	334:19,20	196:2 228:24
36:23 37:1,2,5	182:1,3 183:4	336:12,14	230:6 231:10
40:20,22 42:1	183:7 185:16	knowing 167:6	252:19 261:24
45:5,8 48:11	185:17,19	300:9	263:10 279:3
49:2,11 50:3	186:24 188:2,8	knowledge	322:7
50:15 52:7	198:16,21	117:23 182:2	larger 205:5,6
54:7,9 55:3,6	200:8 206:8,14	196:12	
57:17 68:17	207:1 208:24		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[late - line]

Page 39

late 175:15	326:16,18	114:20,25	level 239:14
178:20 211:4	lawyer 11:3,7	115:13,15	liberty 128:13
law 4:2 7:24	15:9 32:16	117:6 125:12	license 10:15
8:7,14,16 10:4	59:14 63:20	130:19,20,24	338:25
10:8,11,16,20	67:6,19,20	131:1,7,21,25	licensed 10:11
10:25 17:20	110:19 158:1	132:1,6 136:14	lifecycle 249:13
23:18,25 24:20	165:8	137:22,22	252:15
27:14,17 28:2	lawyer's 67:10	159:23 163:19	lifted 120:21
28:17,23 29:1	lawyerly	163:23,25	185:19
29:7,9 30:5,8	216:12	164:7,11,23	light 315:13
31:5,11,16,17	lawyers 15:11	165:5 180:22	334:4
32:21 33:11,22	66:6,9,21,23	215:14 216:1	likely 92:14
34:19 35:1,7	69:9 135:15,16	216:10 224:15	93:12,21,23
35:13,22,25	lay 322:13	225:10,12	94:10 95:4
36:5,12 37:13	lead 51:20	248:23 253:2,9	96:17 97:14,16
48:22 59:15	316:19	254:25 257:14	98:19 99:13
61:23 65:24,25	leading 111:9	273:18 301:14	103:11 196:18
66:16 68:15,22	135:14 183:8	301:16,21	198:1 201:11
69:1 70:8	306:6	302:6,11	321:1,16 322:2
131:7 132:8,11	learned 152:15	308:11,21	likewise 251:8
132:22 133:10	199:22	309:10 326:15	limit 84:14
134:22 135:9	leave 77:12	329:9,13	325:21
137:7 138:15	312:5	332:19 339:19	limitations
165:9,12,22	leaving 83:4,7	340:8	220:17 221:4
212:5 216:4	led 242:20,25	length 310:19	limited 166:10
238:24 241:25	261:22	letter 297:18	166:19 168:21
243:4 292:8,14	left 42:18 178:1	298:4,16,21	198:7 221:3,15
326:15	278:4 281:2	299:4,10 305:2	221:19
laws 13:23	323:5	305:10,12,21	limiting 252:15
lawsuit 11:18	legal 5:3 7:1,4	306:7,13	254:10
11:19 68:17	16:6,14 17:6,9	309:24,25	limits 295:22
152:6 180:1	27:24 37:20,24	341:1	line 169:1
194:1 212:5,24	47:11 54:3	letters 332:23	273:15 343:2
236:13 315:1	71:20 113:23		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[lines - long]

Page 40

lines 89:15	47:23 50:8,20	177:7 179:14	237:13 281:2
116:8 160:10	67:7 83:2	179:15,17	285:19 287:15
linkedin 58:17	92:15 93:12,16	182:4 183:22	288:16 325:24
58:19,24 67:4	93:21 94:11	183:23 184:16	live 7:12 18:14
339:11	95:4 96:18	184:25 185:18	27:3 32:1 48:4
list 73:20 74:5	99:1,9,21	185:18,21,21	llc 1:9 4:8 6:16
74:8,10,12,13	100:10,20	186:3,19 188:5	llp 2:5 3:5,13
74:24 75:1,20	101:19 112:23	193:10,22	3:19 4:9,18
75:22 88:11	114:11 116:7	196:17 201:10	local 288:12
89:24 129:6	117:15,25	215:20 216:10	locally 278:5
153:11,24	118:3 119:16	218:3 219:8,15	278:16,19
174:19 189:3	119:24 120:25	220:13,24	located 6:23
213:10	121:6 122:2,4	233:5 236:9,11	31:17,20
listed 52:4	122:16,23	236:17 242:3	location 6:21
56:16 57:1	124:2 126:9,11	253:11 265:5	86:24
58:14 61:23	127:22 128:22	266:22 267:12	log 178:24
74:1 75:13	130:9,11	271:6 272:1	211:4 212:7,7
115:19 117:1	135:22 136:3	274:23 275:11	212:10 321:9
175:2 178:23	136:25 138:3	276:22 281:21	321:24
180:23 324:18	141:17 143:10	286:7 292:23	logged 268:11
336:19,21	143:20 144:4	293:24 294:23	268:13
listen 165:19	144:20 145:2	296:1 304:20	login 268:14
lit 118:11,13	148:11,24	310:8,12 316:4	logs 193:25
181:8 206:1	149:2,11	316:20 325:14	202:17 203:14
216:13	153:25 154:14	327:10 332:23	203:22 209:15
literally 96:15	155:10 156:9	339:22	209:18 210:17
291:17	157:2,18 159:6	litigations	211:10,14,19
litigant 33:23	159:13,21	176:14 183:8	212:1,16,19,22
304:10,11	160:4,21 161:4	189:1 269:6	213:7,8 247:4
litigant's 33:22	161:6 163:13	313:3	247:6
litigation 27:12	166:11 168:22	little 28:13,14	long 75:20 87:7
32:15 34:8	173:2,4,23	110:20 142:18	162:25 185:22
35:18 36:21	174:14 175:3,7	166:3 167:8	209:25 232:14
40:8 45:14	175:20,20	189:24 231:13	245:23 258:3

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[long - make]

Page 41

263:19 270:8 297:3 longer 209:23 210:1,7,8 212:11 253:13 257:23 259:23 308:7 332:1 look 20:20 29:19 39:18 43:19 52:23 56:6 59:10 65:20 73:19 79:23 85:4 88:21 95:21 115:3 116:14 124:7 136:11 154:7 155:2 168:15 174:5 188:23 189:15 203:1 225:11 240:14,16 248:8 259:6 275:5 277:20 283:7,9 285:12 290:16,22 294:10 298:15 304:13 305:17 317:16 looked 44:4 73:15 110:10 113:1 199:11 199:12 214:2 228:5 281:10 285:15 305:12	322:16 looking 73:22 74:23,25 85:14 87:8 92:11 101:23 102:11 113:20 133:11 145:7 153:21 155:16 171:12 188:1 247:8 251:16 281:6 281:18 294:8 299:2 305:20 331:7 looks 263:25 285:20 304:14 304:23 ██████ 91:24 271:22 273:6 274:14 275:8 275:15 340:20 ██████ 270:19 272:9 273:3 lose 247:19 333:21 losing 243:22 loss 14:11 226:18 lost 13:3,5 19:1 19:8,14 20:7 20:15 37:7 199:20 217:24 227:3 236:24 237:10 273:10 309:22	lot 142:8 165:12 173:3,9 206:13 267:17 303:25 325:24 louis 59:19 61:13 louisiana 4:10 lunch 177:21 201:15 lynch 32:13 m m 338:2,24 madaras 3:16 made 36:4 75:22 93:15 98:4 111:18 139:19,21 140:5 152:23 171:10 197:9 207:7 208:21 230:24 250:25 256:18 265:22 276:6,6 279:8 279:14,19,22 280:9 282:1 310:1 336:12 main 327:18 maintain 266:14 maintained 209:23 247:7 293:21 307:15 327:15	maintaining 332:16 make 9:12 13:12 16:6,11 16:14 33:6 35:8 41:10 46:13 56:13 58:3 66:10,22 78:24 93:17 95:17 102:16 102:20 115:25 117:16 119:2 123:6,15 126:18 141:25 142:14 143:8 143:19 157:13 157:14 160:24 173:17 174:23 178:8 188:15 193:1,2 205:14 206:25 218:23 219:17,21 220:7 221:12 222:1 223:19 240:23 247:18 251:21,21 252:7,9 257:4 258:7 259:24 260:19 267:2 272:7 275:1 278:10,11 279:7 280:11 281:17 302:13 303:1 315:19
--	--	---	---

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[make - meaning]

Page 42

343:1 makes 14:17 74:3 84:11 160:7 183:1 280:14 making 34:3 131:7 150:2 160:19 221:1 250:23 268:7 275:24 336:11 malkiewicz 70:5 76:7,15 76:20,23 79:22 81:1 83:9,15 84:3 86:15 87:13 88:8,15 92:6 112:12 156:15 157:14 159:2,20 262:6 317:22 318:2 318:18 321:13 323:10,21 324:5,25 334:16 339:17 malkiewicz's 71:24 76:18 77:3,8,10 79:5 80:1,7 85:5 87:4 88:22 91:13 112:17 113:3 153:19 154:11,20 155:8 156:6 157:8 158:7	159:10 160:1 178:4 199:23 310:24 326:12 336:5,7,22 manage 249:12 manageable 223:21 management 89:2,12 249:20 manner 12:19 131:11 227:19 253:13 manners 314:20 marisa 3:16 marisa.bonap... 3:17 mark 52:11 58:16 76:17 144:23 167:9 195:12 214:3 237:15 259:8 308:11,17 marked 39:20 39:25 42:18 52:15 58:17,21 65:14 76:24 114:17,21 145:3 167:14 195:18 214:8 224:17 234:6 234:10 237:20 259:12 273:7 283:13,16	289:8,12 297:20 305:6,9 307:10,15 309:11 330:15 marketing 67:13,22 marking 65:10 224:13 297:17 marks 309:10 marrazzo 5:3 6:25 mass 227:22,23 massive 249:10 material 298:24 materials 35:5 72:19,25 73:10 74:13 237:15 301:22 302:14 303:2 311:13 matter 6:15 12:20 32:14 54:9 55:22 70:1 107:10,23 108:7 122:2 127:6 128:8 129:11 142:2 142:16 161:22 162:8 184:1 216:24 257:19 258:13 matters 35:24 37:4 60:1,10 60:24 99:10	100:25 181:25 216:11 218:3 219:16 325:14 326:6 332:20 337:4 maureen 2:7 7:3 78:24 338:2,24 mean 35:25 41:6 45:23 48:11 55:25 57:2,6 60:5 63:2 64:17 72:2 75:23 91:16 106:13 111:25 118:23 119:13 122:2 124:11 136:10 141:12,12 152:22 171:24 186:22 188:14 194:18 197:4 202:23,25 220:12 228:18 233:3 236:12 269:7 288:13 295:20 302:24 313:1 314:16 319:11 325:5 325:20 331:24 334:5 336:6 337:3 meaning 101:22 268:13
---	--	---	---

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[meaning - metadata]

Page 43

294:22 meaningful 235:9 means 14:11 70:8,13 92:4 108:10,11 117:18 219:21 219:23 249:9 255:4 278:4,18 326:5 327:17 meant 60:6,24 61:1 73:3 263:16 281:25 302:22 309:5 323:13 324:7 336:7 measures 148:23 mechanisms 314:17 media 66:6 medication 201:14 meet 287:12,24 288:11 289:2,6 311:1 meeting 252:18 304:20 member 145:11 145:24 146:3,7 members 146:16 170:5 memo 215:3 223:23 330:15	330:21,24 331:10,12,15 332:2,6,15 mention 53:3 81:12 87:23,25 88:10 127:19 145:10 244:12 324:23 mentioned 36:24 51:4 61:24 107:14 115:24 130:18 183:9 207:25 219:19 233:7 254:8 258:24 262:1 276:15 303:20 309:17 mentions 88:6 255:25 300:11 mere 255:9 merely 41:7 meritorious 242:13 merits 292:24 296:13 315:13 merrill 32:13 message 82:21 97:24 119:3 127:6 128:7 138:12 142:2 142:16 202:18 246:3,8,10,13 246:15 247:2 247:13 265:4	297:1 302:1,1 303:14,16,18 303:19 309:5 334:14 messages 14:24 18:9,22 38:6 38:14,22 39:6 41:2 71:5 81:12,21,24 92:14 93:11,20 95:2,11 98:24 103:11 107:22 108:6 109:16 116:1 124:1 125:14,20 127:24 137:24 138:6,19 158:22 195:6 196:19 198:2 198:19 201:12 204:23 205:18 205:21 212:9 218:22 233:22 235:9,11 246:25 260:23 261:9 274:24 296:23 300:15 300:22 301:2 304:1 305:24 306:1,2 307:4 307:4,9 309:13 321:10 323:10 333:1,23,23,25 335:19	messaging 81:22 95:3 104:12 108:23 109:11 110:2 111:15 115:14 122:15,22 123:8,25 124:24 125:8 130:4 131:14 135:22 136:9 136:20 137:20 137:21 139:4 141:23 203:24 212:8 237:20 238:8 240:3,8 241:1,12 242:2 242:12 243:6 243:18,23,24 244:6,15 245:1 245:12,17 247:14 248:12 248:14 249:18 252:5,14 254:1 254:18,23 255:4,10,14,17 256:5,13 257:7 257:13 258:15 300:20 304:24 331:1,9 340:16 met 16:3,21 meta 321:9 metadata 193:25 194:6,8 194:10,12,14
--	--	---	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[metadata - najam]

Page 44

210:17 211:9 211:10 212:1,7 213:7 247:1 322:15 method 137:24 185:10 methodologies 147:18 148:3 methodology 185:6 198:14 329:22 330:1,6 330:10 metropolitan 32:2 michael 76:23 339:17 microphones 6:6 microsoft 127:22 128:4 128:18,20 middle 199:21 257:12 258:4 284:3 334:22 midst 332:18 millions 196:18 198:1,17,18 201:3,11 202:12 217:12 218:2 260:23 261:8 mind 118:12 184:7 230:8	minds 239:12 239:19,21 minimization 254:7 minute 20:22 32:18 158:6 320:4 minutes 87:2,3 87:9 113:21 171:2 213:17 323:5 328:6 miracle 51:9 mirakl 51:11 51:12 53:9 54:19,21,22 misconstrued 215:14 misheard 23:15 misleading 66:11,24 67:23 303:8 304:6 318:16 319:17 320:9,17 misleadingly 67:11 mispronounc... 223:4 misreading 42:4 misreporting 274:14 misrepresenti... 275:16	missing 206:12 284:15 335:19 moderated 57:10 modified 234:24 235:1,2 monopolizati... 186:21 187:7 189:5 monopoly 178:18 180:13 184:13 185:2,3 months 59:6 morning 6:1 motion 14:2 26:1,20 195:23 297:25 motions 25:1 motive 38:4,13 39:14 41:15,19 41:22,25 43:6 43:10,21 44:25 231:2 motives 38:17 movant 17:25 19:13 20:13 move 103:9 161:21 200:3 234:8 243:10 246:21 248:7 252:23 320:5 320:22 323:1 moved 10:24 120:11	multidistrict 310:8 mute 6:8 n n 3:1 4:1 5:1 8:5,5 106:10 339:1 najam 4:13 7:16,16 8:9 21:4,7 33:13 34:13 37:8 52:10 63:8 65:1 66:18 82:8 94:24 103:7 110:16 111:11,19 112:4,24 114:2 119:19 120:7 133:7 134:1 141:4 142:8 144:23 155:14 164:16 165:16 166:7 167:9 177:16 178:25 182:7 184:2 185:4,24 202:25 207:11 208:8 209:3 213:11,20 229:14 233:23 243:9 250:8 253:14 262:23 266:15 267:20
---	---	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[najam - notifications]

Page 45

275:3 278:2	113:22 117:13	227:11 237:24	334:3
280:17 286:24	117:15 120:1	274:9 285:1	normal 89:1,11
306:8 316:5	138:22 141:8	310:8	north 4:3
317:9,13	161:13 172:4	nfe 51:25 53:14	norton 2:4 3:5
320:21 322:10	172:15 173:5,6	54:21 56:1	3:13,19 6:22
327:16 329:11	186:10 207:2	60:23	7:22 68:22
330:4 331:3	221:14 228:3	nice 58:1	nortonroseful...
333:11 334:2	234:1 240:1	nod 78:8	3:9,11,17,23
335:7,13	245:2 256:12	noddied 302:21	notary 2:9
336:24 337:11	295:10,25	non 116:20	342:13
339:3	314:13 315:2	127:20 244:20	note 6:5 168:11
name 6:25	needed 146:6	244:21	168:16 193:8
25:16,23 30:24	needs 137:21	nonresponsive	233:9 252:25
52:4 68:18	138:25 173:15	37:9 66:19	noted 179:21
93:5 122:1	173:17 293:21	82:9 94:25	239:23
128:5 129:2,8	negatives 44:21	103:8 106:2	notes 65:22
212:4 213:5	negotiations	110:17 111:21	91:25 137:19
223:4 270:16	310:21	112:25 118:17	169:20 170:12
286:17	neither 338:16	119:21 120:8	171:12 248:19
named 52:8	338:19	133:8 134:2	292:3 294:4
names 128:14	neutral 51:5,13	141:5 149:5	notice 2:4
128:17 129:15	51:18 52:6,20	155:15 165:17	172:11 174:3
299:20	53:8 55:19	179:1 182:8	174:13 175:13
narrow 67:10	59:25 60:9,13	184:3 185:5,25	176:5 219:12
nature 199:15	60:23	192:18 200:4	219:14
203:19 325:13	never 31:9	207:12 208:9	notices 100:10
near 315:1	63:25 108:12	209:4 229:15	100:16 114:12
necessarily	123:12 143:4	233:24 243:10	114:20,25
25:8 260:12	159:5 193:3	250:10 251:4	339:19
261:3	new 2:6,6 4:21	253:15 256:21	noticing 7:15
necessary	4:21 6:24	262:24 266:16	notification
293:24	10:14 31:20	267:21 275:4	147:2
need 9:4,13	32:1 52:20	287:2 316:6	notifications
68:18 103:16	70:23 171:9	320:22 322:11	148:18

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[noting - objection]

Page 46

noting 199:10	o	322:10	104:2,20 105:6
notwithstandi...	o 281:9,19	objected 21:5	105:16 106:14
240:10	oath 27:3	objecting 96:25	110:4,25 116:9
november	135:20 277:5	97:1 316:10	120:3,22 121:7
69:19,23 234:5	278:17 323:20	objection 11:9	122:9 124:9
234:24 235:2	object 33:13	13:10 15:14	126:5,20
340:12	34:13 37:8	16:4,22 18:2	129:24 131:22
number 49:10	66:18 82:8	18:16 19:4,16	132:13,23
90:1 157:1	94:13,24 103:7	20:10,17 21:2	135:3 136:6
185:15 195:5	106:1 107:25	21:14 22:2	137:15 139:15
198:9 202:11	110:16 111:8	23:7 25:3,20	140:22 141:10
204:22 205:17	111:19 112:24	26:2,10,22	144:6,15
205:19,20,21	118:17 119:20	27:15,21 28:4	147:22 148:13
209:20 210:11	120:7 127:8	28:19 29:3	149:14 150:17
235:23 236:2	128:10 129:4	31:7,14 32:7	151:4,10,15,24
244:10 261:10	130:22 133:7	34:1,20 35:15	152:21 154:16
261:19,24	134:1 141:4	36:6,16 37:15	155:6,23 158:2
262:2,21	142:4 149:4	37:22 39:7	159:9,24
267:13 268:2	155:14 164:13	40:18 41:4	160:13 161:9
300:12 321:7	164:14 165:16	42:5 43:1,7,22	161:25 162:12
322:8 324:3,3	170:21 178:25	45:2 46:10,19	162:24 163:11
328:9 336:8	182:7 184:2	47:2 48:24	163:16 164:5
numbers 199:2	185:4,24	49:21 53:10,12	164:16,17
206:9 231:10	192:18 207:11	58:6 61:6 62:5	165:2,11,25
numeral	208:8 209:3	67:14 70:10,24	166:14 167:3
153:21 317:17	229:14 233:23	73:17 75:10	168:3 170:1,8
317:19 323:9	243:9 250:8	77:25 83:13	170:16 172:2,7
numerals	251:3 253:14	85:11 86:21	172:21,25
317:20	256:20 262:23	87:5 88:18	174:16 176:7
numerous 24:1	266:15 267:20	90:24 91:20	177:15 179:8
80:17 110:15	275:3 276:2	95:7 96:5,20	184:8,19
261:1,6	286:24 306:6	97:9 98:6	185:12 186:8
nw 3:14	316:5 320:21	99:15 101:13	188:19 191:2
		102:18,24	191:11 192:12

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[objection - okay]

Page 47

192:24 197:14	objectives	offer 12:4,5,9	43:5 44:1,21
201:5,17 205:8	242:14 248:25	15:11 41:11	51:23 54:19
206:23 207:23	254:2,5	47:10 130:19	65:1 73:2
209:17 210:19	obligated 18:1	202:1 249:18	74:10,23 80:19
211:17 220:2	obligation	335:3,9	80:25 82:6,25
228:2 230:10	35:20 66:10,21	offered 12:8	83:9 85:4
231:3,21	67:10 130:15	163:24 231:25	86:13 87:1
232:19 234:20	131:1,2,2,5,20	323:21	88:14 91:12
235:19 236:14	131:21,25	offering 13:15	92:9 95:23
237:1 239:16	132:9,12,18	15:2 33:1,2	96:10 102:2,3
244:1 250:2,17	136:4 191:13	41:1,13 101:4	102:9,15 103:5
251:24 258:18	191:15 257:14	113:4 197:12	103:23 104:4
264:15 271:8	312:12,18	241:2	107:18 108:15
271:12 272:4	obligations	offers 85:7	109:23 112:24
279:10,16	18:14 54:3	300:18	114:2 116:19
280:3 282:20	112:9,15 113:6	office 100:5	117:12 118:16
286:11 287:10	113:14,17,24	117:1 298:17	122:24 125:22
287:22 288:8	190:2 243:16	299:11 305:13	127:25 130:25
288:23 296:14	observations	306:14	131:18 141:19
297:12 302:19	133:18,20	officer 8:7	149:4 150:5
304:15 306:12	134:7 238:14	offices 2:4	151:1 153:1,18
306:23 309:7	observed	31:18 193:9,21	154:6 157:4
311:22 312:6	335:17	oftentimes	168:15 169:2,6
312:23 313:12	obsolete 222:15	97:22	169:23 174:9
313:23 315:15	235:6	oh 78:10	176:3 177:18
315:22 316:12	obtaining	120:16 211:13	180:4,9,20
320:6 323:23	242:4	216:25 225:11	185:4,24
326:19 329:11	obvious 141:8	273:3 292:6	195:12 200:2
330:4 331:3	obviously 9:7	okay 8:24	200:18,21
332:14 333:11	286:14	12:12 14:21	202:14 210:6
334:5 335:7,13	occasion 57:18	15:8 16:11	212:4 213:11
336:24	occurred 72:7	22:23 26:25	214:15 215:12
objections 7:9	occurring	33:13 36:9	217:15,23
8:22	172:17	38:3 41:10	220:25 226:5,9

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[okay - opinion]

Page 48

229:14 230:1	ongoing 222:9	opining 14:21	105:10 107:23
231:12 239:23	231:8 232:1	15:5 16:1	108:7 113:4
240:22 243:9	249:15,25	38:21 40:16,21	120:16 126:2
247:18 248:4,7	250:7,13 252:8	42:3 54:2	129:22 130:14
248:10 250:8	252:16 254:12	82:12,14 83:1	130:20,24
252:23 256:20	269:5	86:15 157:9	131:8 132:2,4
257:25 259:24	online 225:24	209:12 210:6	140:9,17,18,21
260:13,22	290:8	215:22 260:3	141:15 143:13
265:1 266:3,15	oops 40:3	274:13,16	143:14,18,24
267:20 268:6	open 293:1	275:14,19	153:20,22,25
271:20 274:5	operate 182:3	311:18	154:13 155:18
274:13 277:14	233:16	opinion 12:5,16	156:1,2 159:21
284:14 286:16	operating	12:18 15:2,11	160:10 161:3
286:24 287:14	227:18	25:14,16,18,23	161:14 164:11
288:2 290:13	operation	33:2 37:20	175:13,18
292:6 293:11	227:5	38:17 39:2,11	176:3,13 178:2
304:3 306:8	operations	40:5 41:1,6,12	178:9,12,15
309:23 310:4	150:9,14	41:14 42:11,15	179:5 180:10
314:24 316:5	294:14	42:20,21 43:6	182:17 183:1
318:8 320:21	opine 17:1	43:9,21 44:3	183:12,16
323:2,7 326:2	37:11 38:15	44:10,25 45:5	186:17 187:9
326:8 327:16	81:2 83:10	45:8,9,11,16,22	188:1 190:21
337:13	88:15 112:14	45:24 55:14	191:22 197:3
old 220:21	136:2 156:15	70:5,23 76:7	197:12,21
221:13 235:11	159:8 228:14	76:14 77:16	198:18 200:6
once 9:2,5 77:9	244:4 265:12	78:3 84:11	200:19 201:23
133:4 167:1	281:19 310:25	85:7 86:1,6	202:2,15,21
182:17 193:21	318:19	89:10,14 92:13	203:16,20
243:4 283:5	opined 13:5	97:6 100:19	205:2 210:3,20
301:13 310:6	16:7 21:18	101:5,17,21	214:22 227:24
ones 21:11 76:2	66:9 159:3,5,5	102:10 103:1	230:22 232:1,6
153:14,15	opines 80:7	103:10,17,20	232:14 258:25
172:20 277:15	89:1 197:5	104:3,9,13,15	261:14 263:1,2
308:24 326:11	205:24 319:23	104:24 105:8	263:5 265:1,10

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[opinion - page]

Page 49

265:16,22	157:12 158:16	53:4,5,22 55:8	outlined 248:13
266:17 271:15	159:11 160:1,7	109:16 157:13	outside 40:10
279:4,6,12,13	160:23 161:2	226:14 310:21	117:24 126:8
279:18 281:12	163:19,25	311:4,11,17	285:23
282:14 304:9	164:8,23 165:5	312:4,4 330:20	overall 202:18
317:22 318:6	165:6 167:21	339:9	203:23
318:23 319:18	168:13 187:15	organization	overriding
319:20 320:8	190:23 238:3	125:5,15	211:15,25
320:19,25	253:16 275:6	136:16 241:2	oversee 272:25
321:15 322:3	280:6 310:22	242:6 278:22	own 20:25 31:3
322:25 323:3,9	310:24 313:25	285:24	31:4 57:19
325:17 330:25	318:24,25	organization's	107:5 126:7
331:5 332:12	323:21 324:14	241:24	147:20 148:5
333:7,18	324:24 328:20	organizational	171:19 172:10
335:16	328:24,25	248:18 270:13	268:18 276:13
opinions 12:9	329:3,13,23	270:15,17,25	p
12:13 13:6,13	330:11 335:3,9	271:5,23	p 3:1,1 4:1,1
13:14 16:7,14	335:22 336:5,9	273:17,20	5:1,1 107:3
17:18 18:19	336:15,18,21	274:10 275:24	p.m. 114:8
19:7 25:7	337:6	organizations	177:19,23
27:24 28:7,21	opposed 327:4	127:13 241:3	222:23 223:1
33:1,10 34:4	opposing 27:5	243:13,16	280:20,23
37:25,25 38:4	121:6	248:19 249:11	327:24 328:2
38:12 41:17,19	opposite 78:18	250:12,22	337:14,18
47:11 69:25	304:19	256:5 257:4,11	page 40:2,3,4
70:4,15,17,20	option 126:13	orient 256:23	51:3 52:23
70:21 74:2	137:25 258:3,3	original 111:4	56:9 59:23
80:11,22 83:16	286:22	130:1 148:8	60:2,4,12,16
83:21 84:4	options 258:21	172:8 210:14	65:20 72:17
87:22 88:11	274:21 285:17	originally	74:25 75:12
109:1 112:6,17	285:22	212:23 226:2	76:5 77:9
113:7 130:19	oral 302:12,25	319:21	88:22 92:19
133:5 135:2	order 42:23	outcome 7:8	115:3,5,11,11
155:8 156:3	52:11,14,18		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[page - part]

Page 50

116:14 145:5	pages 66:11	123:21 124:17	paragraphs
146:14,24	217:12 218:2	124:19,20	79:24 113:2
153:18 156:6	253:5 274:6,7	125:23 130:6	154:24 155:10
157:8 161:18	284:8 335:25	133:15 146:25	155:17 181:13
168:18 169:4,5	336:20	148:17 155:2,4	277:19 324:10
169:16,17	paid 61:10	155:9,16,20	324:17 325:10
171:13 174:5,9	paint 315:12	156:4,4,12,14	paralyze 150:9
178:6 196:4	panel 57:10,10	156:19,20,24	150:15 294:15
203:5,8 213:24	57:22,23 58:5	157:6,11,15	paraphrasing
215:11 225:11	panels 57:18	161:17 168:19	217:24
226:5 228:6,17	paper 190:25	168:23,24	parenthesis
233:9 235:2	191:4,10,17,22	169:3 174:7	252:17
240:17 241:8	192:2,4,6,10,14	176:11 178:2	parenthetical
241:17 242:24	192:22 251:19	180:23 196:16	115:21,24
243:3 245:9	252:4	197:2 202:2	116:4 125:2
246:19 247:8	papers 193:9	203:4,5 214:1	parkway 4:3
248:8 251:4,7	paragraph	215:4 217:9	parrot 197:5
253:2,22	40:4 42:2	228:6,8,13	part 23:22
254:14 255:23	45:10 51:3	229:2 240:25	24:15,17 26:13
256:21,25	65:21 77:4,7	241:11,18	29:10 32:4
257:1,11 259:6	77:15,21,24	242:24 243:3	58:11 77:21
265:11 273:13	80:13 81:6,7	252:13 254:15	80:23 81:25
273:15 277:16	81:19,25 84:10	255:12 257:22	82:1,16,19,20
277:21 281:8	84:23,23 85:1	258:2 265:12	102:8 118:14
283:21 284:1	85:25 86:14,19	277:17 281:9	122:3 129:9
285:16 290:23	86:24 87:25	281:19 290:24	133:25 134:5
290:25 292:7	88:5,21,25	293:18 295:19	156:3 157:17
295:19,21	89:18 90:14	295:20,21	160:23 167:19
297:22 298:16	91:9 92:10,18	296:8 299:24	171:1 177:1
299:9 305:20	92:22 94:16	302:8 303:4	181:2 183:21
309:16 317:7	96:2,8 97:6	305:22 306:18	188:8 197:3
317:14 320:23	103:18,23	319:7,12 320:9	198:15 199:2
323:7 343:2	111:22 112:5	320:23,24	199:16 216:16
	112:18 113:1	322:24 326:2	217:13 219:9

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[part - perjury]

Page 51

220:8 221:2,13	238:22 239:15	236:3,4,8	291:2
222:2,8 225:19	240:3 241:25	274:19 295:5	people's 260:1
228:3 236:1	269:16 270:2	295:11 297:11	perceived
237:5 248:12	276:11 284:18	315:9,18	240:1
257:21 264:17	296:7 325:18	316:25 326:16	percentage
279:4,25 284:4	particularly	327:3,9 333:20	206:19 261:11
287:13 290:9	80:18 134:18	party's 15:22	261:13,15
310:7,12	255:1	33:23 35:11	263:6,11 322:5
311:12 312:14	parties 6:12	150:8,14,15	perception
318:24,25	18:25 53:25	254:24 294:14	255:19
324:20 325:8	122:1 126:8	pass 327:17	perfection
327:18 333:2	147:4,17 173:8	passed 238:20	151:13,18,19
336:11	190:6,14 287:7	path 107:19	perform 194:24
participant	287:19,24	patient 262:25	197:18 204:7
57:19	294:15,18,22	pause 215:20	performed
participate	294:22,25	249:21 291:10	98:15,21 99:4
8:17 57:14	296:10,18	293:6 294:2	202:1 213:9
participated	304:18,21	300:23 301:3,8	period 56:23
223:10	305:23 310:13	301:17 306:3	111:3 176:6
particular	311:7,18	307:11,16	181:23 185:23
14:25 27:12	338:18	308:14	188:11 205:4,6
39:14 54:2	parts 59:9 73:7	pay 146:6	206:12,14
64:14,15,16	157:15 249:22	pdfs 267:18	209:21,23
74:9 80:12	333:21	peer 35:3	231:15 232:13
92:21 93:4	party 7:5 11:7	124:14 132:16	232:14,22
96:16 104:10	14:13 17:24,25	133:1,2	264:21 321:24
104:19 105:3	18:11,13 19:2	penalty 196:6	322:17
105:19 106:3	26:6,8,21 27:5	pending 186:3	periods 77:17
107:12 108:16	27:5,5 47:22	pennsylvania	90:21 91:14
139:5 161:23	54:2,11,15	31:24	221:8,22
162:9 166:16	55:15 103:14	people 101:18	257:24
168:11 194:2	121:6 162:18	102:5 127:14	perjury 13:23
204:23 205:3	163:6 166:20	177:4 208:19	196:6
222:4 238:15	186:25 227:3	213:2 277:8	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[permanent - policies]

Page 52

permanent 316:20	123:16 138:10 138:17 141:25	plaintiffs 1:7 3:3 7:25 12:4	plus 34:5
permanently 126:11	142:14 143:9 143:19 258:14	15:10 38:23 54:24 103:21	point 63:7 79:25 83:19
permit 89:3,13	286:8	135:15 181:3	84:2 85:15
permitted 274:2	pick 6:7 177:25 180:5 217:10	212:15 296:25 297:12 298:19	87:15 89:15 96:14 97:20
person 72:3 117:8 260:3 309:10	picture 60:2 174:11 189:24 259:19 260:25	306:16 313:10 313:18 314:6	98:22 105:2 108:11 120:20
person's 70:16	261:3	planned 41:25 223:13	130:4 133:15 137:6 166:6
personal 196:12 248:24	piece 190:25 191:4	platform 96:17 98:17 123:25	174:11 178:13 180:19 183:2
personally 71:9 133:9 194:5 201:2	pieces 231:6,7 place 6:11 86:3 90:7,12 108:13	138:25 233:14 233:16 274:20 280:11	184:23 187:10 188:7 189:17 207:17 208:11
perspective 166:11 168:22 242:11	118:25 126:10 128:23 148:24 155:11 160:19	platforms 94:9 108:23 127:4	210:8,23,24 228:22 230:13
pertain 106:5 325:13	170:15 173:5 179:14 183:23	plausible 325:11	232:11 239:9 243:20 277:25
pertaining 171:1 316:18	185:22 186:4 192:14 220:13	play 213:2,4 255:9	278:9,11 284:23 298:10
pertains 105:3	220:24 221:7 221:20 227:9	please 6:5,8 7:10 9:5,9,13	301:9 303:23 316:8 319:21
phase 98:12	229:3,25 253:11 265:14	9:16 40:3 45:8 52:17 84:1	320:2 pointed 84:22
phone 255:17 300:2	266:2 271:19 338:13	114:23 115:13 115:25 156:13	84:23 pointing 22:9
phones 6:9	placed 153:23 157:2 269:20	163:1 165:18 196:4 214:10	points 324:22
phrase 14:17 244:15	plaintiff 68:16 69:11 103:14	216:1,6 219:17 245:9 281:8	policies 49:25 50:4 64:11
physically 122:6,14 123:6	313:4 326:9	290:23 317:10	89:3,12 109:19 110:14 112:23 202:9 221:21 232:23 249:12

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[policies - prefatory]

Page 53

249:14 250:12	possibility	practical 293:3	103:3 107:13
251:9 257:6	246:2 275:10	practice 8:14	124:13 129:7
296:11 297:1	possible 63:25	10:11,16 31:16	131:6 133:6
300:14 326:10	64:2 110:6	32:5 36:20	134:12 135:1
policy 80:2,8	125:7,19	57:13 58:3	135:17,19
81:3 82:11,13	136:19,22	59:14 66:16,17	137:8 188:7,18
84:7 85:8,18	139:2 150:16	78:4 80:9 81:4	189:2,12 209:1
86:16 88:16	150:19,23	81:5 103:25	248:20 287:9
89:16 91:11	245:18,23	104:10 105:1,9	287:21 305:20
92:3 109:15	247:23 297:15	107:20 108:4	311:8 314:11
110:10,24	309:3,6,19	108:17 123:23	practicing
111:5,6,15	313:19	124:7 125:25	10:24 11:5
117:24 132:22	post 230:14,18	127:7,10 128:3	23:13 67:6
133:10 221:7	277:22 290:17	128:6,12,15	70:8
223:13 231:9	postman 69:6	129:1,9,16,17	practitioners
232:1 234:4,11	potential 54:17	129:23 132:16	24:5 134:17
234:12,17,23	173:21 174:14	135:13 176:2	135:14 165:15
235:1,5 256:2	174:18 181:14	208:19 222:1	preceded 90:19
292:8,14 303:7	182:12 183:8	223:9 258:16	108:1 305:11
304:12 306:22	183:13,14	258:17	precedent
306:25 308:6	185:1 187:2	practiced 8:16	163:20
316:11 340:11	188:25 189:19	10:20 32:8	preceding
population	296:2 304:11	practices 16:10	127:9 128:11
181:2 206:20	potentially	17:2 23:24	142:5
portion 254:6	14:12 138:22	24:7 35:2	predicate 318:7
266:11	162:22 163:9	37:11,18 42:22	predicated
portions 72:13	191:13 192:3	49:7,16 63:15	324:19
86:6 290:22	216:23 228:18	64:11 76:9	predicates
position 94:7	233:5,21	78:14 79:14,19	336:5,11,15,21
95:2 96:2	235:17 295:12	81:10 83:17	preempt
positions 58:15	313:6 321:2,17	84:12 86:2,11	111:25
possession	powerpoint	86:16 89:21	prefatory
53:19 54:14,24	57:16,20,25	90:7,12,16	111:9 132:24
162:21	229:22	94:3,19 97:20	155:24 164:14

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[preferences - prior]

Page 54

preferences 251:15	preserve 14:13 15:22 18:8,14	preserved 12:19 16:8	325:25
premise 172:9	19:3 22:11,16	37:7 41:3 42:4	prevalence 330:25
190:12	27:11 29:8,10	82:22 91:7	prevent 130:8
preparation 239:7	31:6,12 32:22	117:17 121:3	135:21 136:2
prepare 242:25	33:24 34:18,23	131:10 137:21	222:10 242:3
present 5:2	34:25 35:12	150:4 166:12	269:16 270:3
37:6 68:7	36:13,22,23	173:6,25 181:1	286:9
presentation 57:12,15 58:5	37:5,12 38:5	181:5 191:6	prevented 192:1
58:11	38:14,22 39:12	192:6 210:22	preventing 138:2 234:18
presentations 57:5,8,9	41:16 42:12,17	231:11 232:3	previous 36:9
presented 19:20 83:15	44:16 46:9	261:23 262:18	58:14 279:24
148:22 229:23	55:15 116:1	262:21 269:21	previously 26:16 168:20
preservation 24:8,21 28:3,8	128:7 130:16	281:13 287:25	227:1 247:5
29:2 34:8	131:1,4,25	296:20 301:16	299:21
35:19 54:4	132:9,12 136:5	303:1 304:2	price 171:22
64:23 89:25	137:3,12	321:23 331:14	172:12 173:20
106:23,24	138:22 151:8	334:1 335:1,6	principal 254:19
112:8,15 113:5	151:22 162:17	335:12	principles 330:3
113:13 151:3	163:3 166:21	preserves 137:23	printout 168:17
190:1 210:16	174:20 175:1,6	preserving 46:3 95:11,12	prior 35:22
239:14,19,22	178:17 190:15	138:5 146:22	68:13 91:23
245:17,22	190:24 191:8	147:19 148:5	182:16 208:1
247:23 254:20	191:13 211:19	148:12 151:13	212:20 277:6
258:22 293:14	226:12 236:22	191:16 212:6	279:19 286:18
294:21 295:2,3	236:25 237:8	267:10 327:11	316:13 331:12
295:23 312:1	243:5 274:23	331:11 332:13	331:21 334:13
326:25 327:13	280:8 301:22	presiding 36:15	338:4
	301:23 302:13	presume 242:1	
	303:17,19	255:3	
	311:19 312:13	pretty 82:7	
	312:18 334:10	93:2 322:5	
	334:11		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[prioritize - propriety]

Page 55

prioritize 251:10	211:16 218:7	product 128:21 277:7 291:1	65:17 339:12
privacy 222:10 248:24	220:8 221:2,13 222:2,9 252:15	production 122:3 145:20	program 126:7 242:13
private 6:7 59:14 327:4	287:13 295:24 296:2 315:11	295:24 312:10 312:21 313:11	prohibit 130:8 131:14 135:21
privilege 48:18 48:23 178:24	proclamation 292:19 293:9	314:3 315:10 317:2	138:11,17 prohibited 257:17 258:11
privileged 47:18 48:8,21 55:3,4 120:2	produce 179:23 213:6 313:20 315:3	productions 312:10 313:16	prohibiting 148:9 149:7,8
probable 161:7	produced 97:24 98:5	productivity 300:19	prohibition 125:7,19 136:19,22 256:4
probably 11:16 30:24 74:20 211:5 248:1	102:12 119:10 119:12,17 140:1 152:25	products 127:17,18,19 127:21	promise 29:19 174:6
problem 21:7 290:6	153:17 178:23 181:3 194:1,6 194:9,13	professional 2:8 47:17 67:13,22 165:7	promote 292:25
problems 215:19	199:14 212:23 229:18 260:24	186:6 268:25 338:3	promulgated 146:17
procedure 17:9 167:13,17 169:25 170:7 226:11 288:3 291:4 339:25	261:9 264:19 264:23,25 293:21 313:17 313:21 321:7 321:25 322:16 323:11 335:6 335:12	professor 72:8 78:18 79:11 158:16,20 194:19 197:7 197:22 198:8 199:3 201:8 205:11,16 207:5,14,20 208:14,21 212:20 318:11 320:12,14 322:15	promulgates 170:6 pronounced 51:8
procedures 147:18 148:3	produces 133:1	profile 58:17 58:20,24 60:11	proper 118:25 properly 217:25
proceed 8:3 55:23,25 61:9	producing 18:12 19:1 147:20 148:5 217:13 295:5 295:11		proportionate 190:7 proposition 92:25 93:1,8 127:2 237:5
proceeding 7:10			propriety 312:3
proceedings 337:17 338:11			
process 8:20 145:25 192:14			

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[protect - quasi]

Page 56

protect 248:24	319:1 336:16	pull 330:18	176:4 185:9
protection	337:5	pulled 31:23	192:14 211:12
242:16	provides	punchline	221:7 228:15
protocol 53:23	112:21 160:24	173:13	228:17 229:25
55:1	166:9 198:9	purchased	232:6 240:12
protocols 312:9	providing 28:7	233:17	253:21 258:23
provence	132:1 137:7	purely 116:20	262:8 265:14
329:10	141:15 164:10	244:18 246:9	271:18 274:22
provide 25:8	provision 41:9	246:16,18	276:25 285:16
27:23 28:21	42:10 136:10	purported	287:4 293:8
36:19 37:2,24	227:2 250:18	324:14	301:14 303:14
37:25 53:24	289:5	purporting	311:14
55:8,8,10	public 2:9	76:14 196:12	puts 133:18,21
57:19 109:16	49:19 127:19	purpose 26:15	169:24 246:7
109:21 121:15	129:7 242:4	135:6 193:15	putting 26:25
163:18 166:19	342:13	239:2 244:4	66:15 100:10
168:21 186:11	publication	255:21 274:11	138:1 149:21
203:23 226:15	35:4 96:15	292:22 293:7	174:3 189:8
227:11 242:11	141:24 142:13	315:20	198:6 301:24
282:16 297:4	225:14 290:10	purposes 67:12	302:14
310:22 329:12	publications	67:22 202:17	q
329:13	30:18 35:3	255:18 271:25	qualifications
provided 29:15	56:15,25 57:1	296:1	31:3 146:6
34:4 55:5 73:1	124:15 132:17	pursuant 2:3	158:8 197:18
84:19 113:9	133:2 134:6,11	13:23 156:8	qualified
121:2 141:1	134:16,21	310:13	194:25
152:20 153:4,7	publicly 71:21	put 49:13 50:13	quantitative
153:12,16	111:17,18	53:6 66:22	98:16 99:5
164:7 203:13	publish 49:25	67:5 87:19	202:10,20
203:22 206:4	published	124:24 126:9	203:15 204:4,8
206:10,25	56:18 170:18	128:22 134:11	quasi 244:19
207:4 208:23	publishers	148:23 155:11	245:1,12,16
210:5 268:24	314:18	173:5 174:13	246:24,25
276:21 277:12		175:14,15	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[quasi - read]

Page 57

247:11,13,22 question 9:15 9:17,19,22 13:4 17:13 19:24 20:5,6 20:12 21:5 22:7 27:1 28:15 33:7,15 33:18 36:10 50:16 51:24 57:5 64:7 69:5 73:21 74:4 75:19 78:2 79:24 80:5 83:25 84:21 85:22 87:14 88:20 93:18 94:5,14 95:8 95:25 97:3 99:3,18,19 101:11,15 108:2 109:7,23 110:5,20 111:4 111:10,12 118:7,12,15,18 119:20 120:6 122:11 125:24 126:6 127:9 128:11 130:2 132:2 135:24 136:23 138:6 141:6,20 142:6 142:6,11 146:18 147:24	148:8 149:6,18 154:8 156:10 156:11,14 159:17,19 161:10,20 162:3,13,25 163:15 164:4,6 164:15 166:1 167:6,7 168:9 171:8,9 174:22 174:22 175:11 179:2 181:4 188:22 189:7 192:18,25 200:19 201:18 201:20,22 204:3 205:10 205:13 207:16 208:10 210:15 211:22 221:10 221:23 231:13 232:11 233:8 234:1 245:8 250:20 263:3 266:4 267:5,24 269:24 273:21 275:13 279:25 287:14 288:10 288:16 290:6 295:8,9 299:12 310:17 314:4 314:14 320:7 322:12 327:1	questioning 7:19 questions 8:21 9:10 47:6 138:4 165:19 173:10 201:16 216:9 253:17 300:13 302:5 328:6,10,15 329:20 330:14 332:21 334:25 336:4 337:12 quicker 9:4 quickly 58:15 324:8 quite 109:7 211:21 quote 87:24 89:19 93:24,25 125:3 136:10 163:12 306:7 quoted 95:23 136:12 260:1 quotes 91:24 325:6 336:13 quoting 255:19 292:2,23	raised 188:10 316:14,18 raising 317:1 random 256:25 range 59:8 293:25 rarely 216:6 rather 251:11 rational 293:23 ratto 2:7 7:3 338:2,24 reach 203:16 read 25:15,17 25:24 40:13 45:16 60:11 72:10,13 73:24 74:7 79:20 82:1,4 89:4 115:16 116:3 116:15 117:19 118:19 124:2 125:4 130:16 147:6,13 152:8 152:10 154:4 158:7,20 169:7 169:14 171:8 176:18 197:3 197:11 200:10 204:1,6 215:2 215:22 216:17 217:25 227:6 228:13 235:12 240:23 242:6 242:16 243:18
		r	
		r 3:1 4:1 5:1 8:5 106:10 338:1 342:1 raise 316:24	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[read - recipients]

Page 58

244:6,8 248:25	72:22 73:15	297:10	328:8 329:20
249:22 251:15	96:24 97:1	rebut 70:20	330:13 332:21
253:8,10,17	144:16 164:10	76:14 158:16	334:25
257:19 258:2,4	165:20 231:16	rebuttal 70:9	recap 12:2
260:4 267:22	248:1 261:17	70:13 88:11	44:22 73:5,14
270:19 271:3	263:8 323:20	112:6 197:6	83:5 91:19
282:12 291:17	325:3	328:11 329:1,4	108:15 128:24
292:1 293:16	realm 187:6	335:4,10 336:8	160:11 243:25
295:10 296:3	reask 20:12	336:16 337:7	receive 103:4
299:8 307:1,2	21:8 83:25	rebutting 70:5	172:11 260:15
311:17 312:15	141:20 234:2	70:16,19	received 39:25
321:4 322:1	reason 16:15	153:21 324:14	52:15 56:4
337:2,3 342:3	239:24 240:4	recall 13:20	58:21 61:10
reading 78:20	272:22 297:22	14:19 22:12	65:14 76:24
79:4,8 90:10	reasonable	25:22 26:4	114:21 145:3
92:7 100:20	19:2,10 125:6	32:11 63:24	167:14 195:18
101:5,8,18	135:17 136:17	64:13,25 67:16	214:7 219:12
171:3 187:22	148:25 151:3	74:21 97:12	219:14 224:17
187:25 217:8	151:22 163:22	101:2,21	234:5 237:20
245:14 249:4	173:18 190:2	113:18,19	247:2 259:11
255:15 258:8	239:12,18,21	114:1,14 121:9	273:6 283:15
301:13 319:6	294:20 295:22	121:10,17,19	289:12 297:20
reads 168:19	reasonableness	122:18,19,20	305:5 308:20
319:5	151:9	133:16 139:7	recently 226:4
ready 154:8	reasonably	197:20 220:5	recess 65:5
real 143:17	152:3 161:24	238:17 240:4	114:6 177:21
reality 166:24	162:10,19	259:2 271:21	222:24 280:21
169:11	163:6 171:24	272:17,18	327:25
realize 225:13	174:1 182:20	276:18 281:15	recipient
realized 256:11	reasons 42:9	285:5 289:21	298:16
273:2	48:15 49:10	292:10 294:11	recipients
really 38:18	222:7 242:20	298:6,25 300:9	115:12 126:12
41:7 45:24	242:22 244:10	310:3 311:11	130:10 131:15
54:6 58:15	262:2,6,22	316:14 322:22	135:23 247:3

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[recipients - regulations]

Page 59

273:18 281:21	301:1,6,10,15	113:23 153:22	105:11 106:24
recognize	301:25 302:15	154:19 181:12	160:20 163:22
253:25	307:3,11,15	226:7 228:8,9	257:23 312:1
recognizes	308:1,6,12,17	241:14 272:9	314:2
249:24	309:11,20	311:10 319:11	regarding 28:7
recollection	325:2 327:24	321:6	29:2 38:1,17
27:9 271:13	328:3 331:14	referenced 46:1	53:25 54:6
279:1	331:16,22	84:24 182:13	55:10 64:19
recommend	332:17 337:16	189:18	80:14 150:3
220:10	recorded 6:13	references 17:5	175:25 178:17
recommenda...	recording 6:10	17:7 81:23	198:9 216:9
117:7,9	211:6 308:9	217:17 218:1	219:16 220:18
reconcile	recordkeeping	299:25	224:2 240:8
243:21	254:20	referencing	243:17 258:21
record 6:2,12	records 112:22	39:15 40:22	259:3 265:2
7:14 8:22	249:20 309:11	41:8 45:4 88:4	275:9 282:23
11:17 21:8	redacted	101:12 120:13	282:23 289:6
40:12 41:11	114:20,24	133:24 159:12	325:22 328:10
42:13,14 52:17	332:22 339:19	161:12 259:5	regimes 242:16
65:4,8 83:4	redactions	referred 278:21	registered 2:8
87:19 101:7	140:1	299:19	338:3
114:5,9 117:16	reduce 223:14	referring 38:9	regular 220:7
125:14 142:21	235:6,10,11	38:20 67:17	221:12 222:1,8
142:25 143:11	reducing	102:7 150:25	302:12,25
143:21 145:6	223:18 248:21	154:3 209:6	303:2
171:3 177:20	redundant	219:9 283:20	regularly 60:13
177:24 205:18	235:6	292:17	193:17
218:23 219:18	refer 11:2,11	reflect 41:18,19	regulated
219:21 222:23	45:9 130:1	41:24 260:24	106:12
223:2 227:25	265:9 292:11	331:5	regulation
230:9 231:18	292:15	refocus 292:23	241:25
234:23 246:9	reference 76:6	refutes 319:19	regulations
280:20,24	81:20 88:1	regard 28:22	106:17 107:6
281:3 300:23	93:15,16	81:9 94:20	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[regulators - renard]

Page 60

regulators 240:2,8 241:14 241:22 242:3 243:14 253:25 255:2,7,12,20	relative 338:16 338:19 relay 170:13 relaying 223:10 release 186:5 186:15 released 256:19 releases 240:6 240:11 256:19 relevance 33:16 relevant 14:12 33:12 54:8 92:15 93:12,21 94:11 95:4,20 96:17 97:15,23 98:19 99:1,13 100:25 103:12 104:23 105:14 105:18 118:11 138:5 139:12 149:13 151:8 151:14,22 158:5 162:22 163:9 190:16 192:1,22 210:22 243:6 257:16 295:12 301:22,24 302:13 313:6 323:12,14 324:7 325:3,14	reliably 330:10 reliant 197:22 relied 25:25 73:8,11,25 75:1 167:20 168:6,13 238:2 277:15 311:10 rely 74:7,14 144:1,13 146:20 147:5 148:15,25 149:1,22 150:2 197:10 relying 74:11 148:10 149:8,9 160:7 168:1 remains 166:13 remedy 226:18 remember 9:6 32:16 33:18 63:17 70:7 121:23 233:25 240:11 271:9 remind 8:25 278:24 reminder 200:18 303:3,3 reminders 302:12,18 303:1 reminding 116:24 remotely 72:6	remove 193:4 193:20 removing 192:22 renard 3:8 7:21 7:21 11:9 13:10 15:14 16:4,22 18:2 18:16 19:4,16 20:10,17 21:2 21:6,14 22:2 23:7 25:3,20 26:2,10,22 27:15,21 28:4 28:19 29:3 31:7,14 32:7 34:1,20 35:15 36:6,16 37:15 37:22 39:7 40:18 41:4 42:5 43:1,7,22 45:2 46:10,19 47:2,8 48:24 49:21 53:10 58:6 61:6 62:5 63:4,9 67:14 70:10,24 73:17 75:10 77:25 78:19 83:13 85:11 86:21 87:5 88:18 90:24 91:20 94:13 95:7,15 96:5,20,24
regulatory 106:4,19 109:5 182:18 183:7 216:11 218:2 254:21 332:20	reid 61:25 rein 288:4,19 291:7 relate 43:9 46:1 173:20 180:16 180:25 280:7 related 7:5 15:11 155:25 174:14 175:4 176:15 177:3 178:14 179:14 183:25,25 191:5 216:23 219:5 257:18 280:5 317:24 318:15,21 319:16 320:16 relates 28:9 78:3 178:16 183:14 193:10 relating 24:2 71:5 179:6,9 179:10 180:16 258:12		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[renard - report]

Page 61

97:3,9 98:6	172:2,7,21,25	312:23 313:12	21:24 22:5,21
99:15 101:13	174:16 176:7	313:23 315:15	23:11 29:18
102:18,24	177:15 179:8	315:22 316:12	39:19,24 45:9
104:2,20 105:6	184:8,19	320:6 323:23	45:25 51:2
105:16 106:14	185:12 186:8	326:19 327:22	53:24 55:10
107:25 110:4	188:19 191:2	328:4 332:14	56:7,11 70:4
110:25 111:8	191:11 192:12	337:9 339:4	72:16 73:8,22
111:24 116:9	192:24 197:14	repealed	74:1 76:5,18
120:3,22 121:7	201:5,17	226:25	76:20,23 77:2
122:9 124:9	202:22 205:8	repeat 33:17	77:4,8,10,13,13
126:5,20 127:8	206:23 207:23	80:4 88:20	79:5,13 80:1,7
128:10 129:4	209:17 210:19	101:15 122:11	81:1 83:10,21
129:24 130:22	211:17 213:16	150:11 161:19	84:5,16 85:5
131:22 132:13	220:2 222:18	162:4,6,7	85:16 86:9
132:23 135:3	225:7 228:2	163:1 167:7	87:4,10,16,24
136:6 137:15	230:10 231:3	172:8 174:22	88:6,8,12,22
139:15 140:22	231:21 232:19	190:12 208:9	89:25 90:10
141:10 142:4,9	234:20 235:19	211:22 246:12	92:7,10,12,19
144:6,15	236:14 237:1	263:2 275:14	96:3,3,8 97:17
147:22 148:13	237:24 239:16	281:16 306:10	101:9,12,22
149:14 150:17	241:5 244:1	335:8	111:23 112:13
151:4,10,15,24	250:2,17	rephrase 99:17	113:3,18,21
152:21 154:16	251:24 258:18	142:10 144:8	115:1,3 123:22
155:6,23 158:2	264:15 271:8	149:16 162:2	133:11,14
159:9,24	271:12 272:4	205:9 231:23	143:24 152:19
160:13 161:9	276:2 277:24	252:2 276:14	153:4,11,18
161:25 162:12	279:10,16	304:17 313:1	154:11,21
162:24 163:11	280:3 282:20	326:21	155:3 156:2,7
163:16 164:3	286:11 287:10	replaced 19:15	157:7,8,16
164:13,20	287:22 288:8	20:16 226:25	158:9,15
165:2,11,25	288:23 296:14	report 12:22	159:14 161:14
166:14 167:3	302:19 304:15	13:7,13,18	161:16 163:25
168:3 170:1,8	306:5,23 309:7	14:16 17:4,15	164:8,24
170:16,21	311:22 312:6	19:22 20:21	165:10,23

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[report - restaurant]

Page 62

168:6 174:6,10	reporter 2:8,9	239:15,22	responded
178:3,4,5	7:2 9:7 78:24	247:10 271:18	273:23
187:25 188:24	338:3	336:10,15	responding
194:9 197:7,8	reports 75:15	requirement	76:21 147:16
197:23 198:8	158:21	151:5 191:8	185:11
201:8 202:14	represent	requirements	response
202:23,25	11:17,18 62:22	105:22 106:5	228:18 233:8
203:2 212:21	representation	106:20,22	299:5 336:3
213:23,25	26:13 67:19	107:16 109:4,6	responsibilities
214:16 218:13	110:8,19 269:5	221:18 246:25	313:20 315:10
219:2 225:8	representative	248:23 289:2	responsibility
228:4 233:10	205:5,25	requires 138:9	312:22 313:11
234:13 239:4	270:21	138:17 151:21	responsible
253:3,6,17	represented	195:8 208:2	249:17
259:7,11,16	32:13 62:3	236:3	responsive
262:2 266:18	110:14 168:1	research 29:24	33:14 34:14
267:22 277:11	representing	52:25 71:18,19	138:23 150:3
277:16 278:11	7:1,24 26:18	71:20,22	161:2 191:14
285:10,15	68:16 69:11	213:10	192:4 228:19
286:22 298:6	298:12	researched	232:7 233:5,22
305:2 310:23	reputation	21:18,22	251:14 321:3
317:7 318:19	255:1	resolution	321:12,17
319:1,22	request 26:7	182:5 184:21	322:9,9,21
320:20 323:8	212:19	291:25	327:14
323:22 324:5	requesting	resolved	responsiveness
324:10,21	297:11 315:9	184:22	322:5
325:1 326:3,12	315:18	respect 14:24	rest 75:8 206:2
328:11 329:1,5	requests 208:2	18:21 27:11	restart 314:18
329:18 335:4	223:21 252:18	41:15 50:19	restate 108:3
335:10,18,23	314:1,2	63:14 184:13	205:10,13
336:1,8,16,19	require 151:2	194:7 328:15	restated 9:13
336:23 337:7	160:24 190:2	329:21	restating 41:7
339:7,16	required	respond 70:18	restaurant
340:18	138:10 220:22	336:20	171:19,22

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[restaurant - right]

Page 63

172:10,14	84:7 85:8,17	returning	revision 226:25
173:9	86:16 88:16	32:25	rewritten 224:6
restored 19:15	89:16 90:20	reused 193:17	224:7,10
20:15	91:15 107:13	revealing	226:13 227:11
restrictions	109:9,15 110:1	242:12	rid 221:13
221:16	110:10,13,24	review 18:1	222:14 250:15
result 113:12	111:5,15	25:6 72:23	right 8:13
227:4	112:22 117:23	75:16,17 194:5	10:23 11:14,22
resulted 22:16	136:16,18	198:23 215:14	12:6,14 13:23
retain 39:5	145:20 173:11	218:15 229:13	14:3,8,14,15
67:4 106:6	218:22 221:21	239:6 245:4	15:3,6,20
123:25 125:13	223:13 233:21	271:20 321:18	17:10,18,20
126:3 127:5,23	234:4,11,12	321:20,22	21:25 22:17
136:14 144:3	235:5 249:14	322:6 326:9	23:2 24:3,8,21
147:12 149:13	250:13 254:11	reviewed 35:3	26:5 29:16,25
156:8 183:13	257:24 259:1	43:4 73:7,7	30:1,15 31:13
233:19 280:8	261:17 263:8	74:14,18 75:24	32:2 33:4 36:1
retained 24:14	270:22 273:19	75:25 100:14	36:5,8 37:14
26:15 48:12	276:23 287:9	109:14,18	39:14 41:1
56:3 60:7,8	287:20 295:15	110:12,13,23	42:19 44:7
61:10 108:12	296:11 297:1	111:7 115:1	46:17 47:1,7
110:7 180:15	299:13 300:14	116:8 121:5	51:6,14 52:2
247:4 251:13	303:7 304:12	124:14 132:16	56:6,24 59:13
301:2 307:9,19	304:21 305:19	133:1,2 159:6	59:16 60:25
309:12	306:22 308:5	198:5 200:14	61:4,15 66:4
retaining 49:7	311:8 312:3	200:23 201:7	66:12 70:9,23
180:11	315:25 316:10	202:4,5,6,8	71:25 72:15
retention 14:24	323:15 326:10	207:2 239:1,8	73:11 75:2
42:22 49:16,25	340:11	265:25 326:11	76:15 77:12
50:4 63:15,18	retract 245:7	reviewing	78:6 82:13,16
63:23 64:4,9	retracting	141:13 217:11	82:18,23 87:4
64:10,14 77:16	131:16	218:1	87:11,11 88:4
78:4 80:2,8	return 223:11	reviews 83:23	90:23 92:5,7
81:3 82:11		245:5	95:20 96:4

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[right - rules]

Page 64

97:17 99:22	212:24 214:19	301:11,18	routed 34:19
100:12,16	215:9 216:14	302:2,17 306:4	routine 89:3,13
101:1 106:6,10	218:11,17	306:22 307:6	150:8,14
106:23 107:3,8	219:2,8,22	307:12,22	227:19 252:18
111:6 113:25	222:9,15 223:6	308:2,18	294:14
115:20 117:1	224:8 225:9,25	309:13 315:21	rudinely 20:25
119:3,15 120:2	226:19 227:6	316:1,21 317:5	21:11 24:25
120:12,21	227:12,19	320:24 321:12	89:11
125:16,20	230:20 232:3,8	325:19 327:16	rpr 338:24
126:19 128:19	235:12,18	rise 37:12	rule 15:18,20
130:16 132:6	236:5,13,19	risk 226:6	17:22,23 18:12
132:21 133:10	238:4,11 239:3	253:2,9	18:24 19:13,24
133:19 134:8	240:3 242:21	risks 219:25	20:3,9,20
134:13,18,22	243:1 244:13	role 16:6,13,25	144:1 148:9
135:2,10 139:6	245:18 246:20	23:21 24:4	149:7,20,25
140:2 142:22	254:2,7,12	26:19 36:18	151:21 167:13
143:1 145:8,16	258:5 259:16	37:1 54:1,5,20	167:17,18,19
145:20 146:1,7	260:17 264:9	roll 210:17	167:20 170:14
147:6,13	265:15 270:9	roman 153:21	171:16 224:1,1
154:21,24	272:13 276:24	317:17,19,20	226:8,10 227:1
158:1,12,17,22	277:2,22	323:8	228:25 235:15
158:25 164:1	278:12,13	ron 6:25	235:23 236:2
164:12 165:1	279:3 280:15	ronald 5:3	236:22 289:4
165:10 166:21	281:23 282:2	room 68:20	291:23 292:4
167:2,22	283:10,11,21	72:3 308:5	293:13 294:5
170:20 171:13	284:6,11,22	root 27:20	310:13,20
173:22 176:12	285:18,19,24	rooted 132:10	316:1,24
179:24,24	285:25 289:17	rose 2:4 3:5,13	339:25
180:7 187:7	291:13 292:4	3:19 6:22 7:22	rules 17:8
189:21,23	292:13,16,19	68:22	19:19,21 151:2
190:19 193:17	294:5,16,23	ross 3:6	151:8,12
195:10 196:8	296:5 297:14	rough 247:16	169:25 170:3,7
196:14 200:11	298:19 299:22	roughly 9:4	170:18,19,19
205:20 206:2	300:24 301:4	62:2	170:20 209:10

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[rules - second]

Page 65

224:11 226:11 288:3,12,18 289:6 291:3,6 293:19,22 327:9 run 153:1,5 194:20 ryan 4:22 ryan.hicks 4:23	santo 61:24 sarcastic 215:17 save 188:2 203:5 265:4 266:6 333:6,14 saved 107:22 108:6,10 119:3 123:18 125:20 138:12,20 142:3,17 143:4 223:14 246:3 297:3 saving 332:3,7 saw 31:21 78:8 111:4 118:9 139:10 158:12 158:14 194:8 194:11,14,15 194:22,23 284:25 saying 26:17 50:18 80:21 85:10 112:7 128:18,20,21 144:1 149:20 159:18 194:21 237:2 252:6,21 252:24 253:4 298:23 313:22 says 52:24 56:15 59:24 60:9,13 79:11 79:16 80:1	90:15 96:16 115:25 116:16 116:19 117:4 117:12 118:23 125:11,17 126:1 134:21 135:8 138:9 143:8 145:9 147:1,1 148:17 155:4 176:12 215:25 217:11 217:17 218:5 219:12,13 224:25 225:12 235:5,13 236:10 241:11 242:23 247:12 249:10 251:8 251:17 252:13 254:22 258:10 260:17 278:16 284:12 297:23 298:22,24 301:1,6 305:23 312:4 319:4 scenes 47:19 48:7 schedule 71:4,7 school 30:5,8 65:25 science 158:25 195:9 232:18 scope 56:22 118:22 121:2	144:4 166:11 173:24 175:13 180:10,14 191:1 295:1,15 295:22 scrap 293:20 screen 33:20 scripts 194:20 scrutiny 254:21 sdj 1:8 6:21 se 143:25 149:20 seal 297:24 search 54:8 216:22 217:1 322:8 searched 153:13 searches 153:2 153:5 searching 54:7 sec 241:15 second 9:6 22:24 59:23 65:22 83:22 84:24 115:18 138:16 144:21 145:2 154:2 168:18,24 169:2 176:12 200:13 215:4 216:16 217:9 217:10,17 241:18 245:3
s			
s 3:1,8 4:1 5:1 8:5 227:2 339:6 saas 62:14,17 63:11,17 104:5 safe 227:2,16 salmonella 172:1 sam 4:3 san 3:20 sanction 17:24 sanctioned 22:17 24:12,16 24:19 46:17 94:9 sanctions 14:2 15:21 25:15,17 26:7,20 120:11 195:23 224:2 226:6,12,17 227:3 236:18 298:1			

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[second - sentence]

Page 66

254:15 267:5	246:7 248:13	292:11 299:13	send 43:17 83:4
293:18 294:11	249:23 250:11	300:15,17	123:17 127:5
295:20 305:22	250:21 251:19	302:7 305:14	142:1,15
306:9,18 307:1	252:5 253:21	311:24 317:25	143:10,21
319:9 321:1	254:15 255:6	321:3,4 323:16	sender 247:3
339:22	255:16 257:9	324:10	sending 138:12
secret 54:9	258:14,20	seeing 19:24	138:18 199:10
55:12	292:7,13	38:19 279:1	260:10 334:14
section 59:11	339:20 340:13	291:19 311:11	sends 302:11
76:13 154:20	sedona's	seek 249:12	sense 9:12 74:3
169:4 240:17	246:15 258:8	seeking 14:2	193:1,2 213:14
256:25 257:9	293:8	256:5	sensible 89:1
299:25 324:15	see 38:8 53:1	seen 76:3	sensitive 6:6
security 248:25	56:25 59:12	180:24 218:12	sent 94:8 95:2
sedona 35:4	60:1,3 72:20	229:8 230:4	128:8 143:1
88:1,5 89:8	76:11 77:4	261:20 264:2	195:6 196:18
94:4,6 97:12	89:8 95:21	264:23 269:25	198:1,10,20,25
124:14,23	98:8 100:17	270:5 298:3,8	200:20 201:3
125:4,11,25	112:10 116:22	302:17 303:2	201:11 205:17
130:5 132:17	117:8,9 125:8	304:10,22	205:22 209:21
132:20,25	128:15 130:11	334:21	210:13 211:7
134:5,15,20,25	154:1 160:19	sees 48:22	246:14 247:2
135:6,7,18,20	161:15 169:13	231:14	261:25 265:5
136:1,8,23	181:15 196:21	select 257:12	266:21 321:10
137:5,10,17	196:24 203:10	269:15 270:2	323:11 325:2
138:9 139:3	216:17 217:14	277:7 285:2	sentence 59:24
141:22 144:20	217:21 218:3,7	selected 56:15	65:22 79:9
144:25 145:11	226:9 232:12	56:25 57:1,5,8	90:19 91:23
145:24 147:1	234:25 241:3	281:14	123:22 127:9
237:14,17	241:15 245:13	selecting 272:1	128:11 131:12
239:24 240:12	248:15 255:22	selection 52:24	131:16 132:24
240:25 242:9	255:24 260:20	sell 66:23	147:16 164:14
242:20,25	273:20 274:2,6	171:23 187:21	168:19,25
244:17,23	278:8 284:10		169:8 176:12

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[sentence - sir]

Page 67

203:6,10 204:2	serving 61:4	setup 285:20	shut 122:6,13
215:24 216:19	set 82:18 83:20	several 17:16	122:14 136:25
217:11 219:11	84:4 107:5	55:7 60:1,5,10	side 55:6 77:14
226:6 251:7	123:24 126:3	60:23,24 75:25	77:14 122:3
257:10,10	127:4 149:3	87:9,21 98:23	175:16 304:19
283:4 291:18	153:4,7 164:1	122:20 128:13	311:20
291:19 292:1	232:23 233:19	198:4,4,24	sidebar 164:17
293:19 294:11	233:20 247:21	214:21,23,24	164:21 207:24
303:5 306:9,10	248:6 269:18	314:19 332:19	306:6
307:1 321:1	281:20 282:1,8	share 50:10	sides 309:15
sentences 142:5	284:14 295:4	sharing 293:1	sifting 235:10
303:6	300:19,22	sheet 343:1	signature
separate 164:4	314:22 321:9	sherman 1:3	338:23
259:8 273:17	327:8 329:17	6:20	signed 13:22
separated	337:4 338:14	short 55:10	195:14,22
192:5	sets 258:20	258:3	significant
september	setting 71:4	shortcut 115:2	249:19 332:19
100:2 189:16	108:13 117:19	shorter 164:21	significantly
190:7 214:7	128:6 129:10	show 17:25	238:23
330:23 331:20	196:20 201:13	18:12,25 19:14	silly 172:22
340:6	218:24 219:1	20:14 187:17	similar 39:10
serial 185:21	232:25 259:1	189:9 209:20	116:11 299:23
serious 201:20	274:9,20 278:5	231:8 260:10	325:6
serve 51:17	282:9,11	305:1	similarly 54:25
61:5,8	295:22 331:16	showed 58:4	simpler 185:16
served 26:19	331:23 334:18	101:24 200:24	simplify 218:6
59:25 60:9,23	settings 109:9	showing 153:8	simply 9:13
255:21 268:20	110:1 116:1	shown 98:18	147:12
serves 60:13	118:25 127:23	158:8	single 127:5
service 62:20	199:5 233:2	shows 212:7	128:7 193:8
62:22 63:13	285:13	229:22	265:4 266:21
services 282:7	settled 55:22	shred 191:17	sir 12:14,21
282:15 283:25	56:4	193:8	14:8 15:6 16:2
			17:4,18 22:1

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[sir - speaking]

Page 68

24:3,8 29:16	301:4,11 306:4	sole 43:20	219:6 224:6
33:4 39:11	307:12,22	solely 26:15	225:6 226:24
40:2,25 45:11	308:25 309:13	45:17	234:9,17
46:6 63:11	316:1 317:11	solutions 7:2,4	236:22 241:4
65:9 70:9	318:2 323:19	somebody	245:11 246:22
76:15 82:10,18	324:25 335:23	31:10 42:24	248:17 251:16
87:1,11 90:23	sirens 237:23	83:2 116:25	258:16 259:18
92:20 100:12	sitting 96:12	173:17	271:2 276:14
101:1 106:3,21	228:12 238:13	someone's	283:3 286:10
106:23 111:7	286:5	36:13	288:14 290:7
111:23 112:4	situated 147:17	soon 174:7	293:18 295:2
112:12 113:18	situation 109:5	195:14 327:19	298:22 299:20
117:2,22	120:5,9 131:8	sorry 18:5 21:6	302:21 308:14
130:21 133:11	140:24 148:21	30:18 33:23	312:14,25
145:8,16	309:22	36:3 39:20	317:19 318:4
154:21 157:12	situations	42:18 43:24	318:10 319:6
167:2,18	191:20 199:11	44:20 61:12	323:4
169:21 171:6	199:24 203:20	62:25 64:9	sought 236:18
171:13 179:24	239:20	68:14 74:25	sound 192:14
188:14 196:8	six 30:12 65:25	78:7,10 80:4	198:15
197:11,16	68:2,10 87:2	81:4 85:21	sounds 14:15
214:1,19 218:9	size 266:9	90:9 93:23	59:16 281:4
218:18 220:25	slash 259:21	95:15 97:16	source 124:6,7
226:19 227:7	260:2,5,9,16	100:21 115:23	294:3
235:14 238:1	slide 58:9,10	126:17 141:19	sources 36:12
238:11 243:1	slides 58:4	145:22 149:8	324:13
245:19 255:25	slowly 79:1	152:18 154:25	space 220:17
260:6 262:23	snapshot	158:15 167:19	221:3,16
265:15 274:3	278:15	168:23 169:15	span 72:24
278:3 281:23	social 66:5	183:11 187:22	209:16
283:23 284:11	society 291:2	188:14 191:25	speak 79:1
289:18 292:4	software 62:20	192:17 203:1	330:25 331:10
292:20 293:11	62:21 63:12	208:5 215:3	speaking 57:21
297:14 298:19		217:14,19	58:8,10 91:2

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[speaking - stated]

Page 69

119:23 speaks 82:2 specialist 5:3 269:1 specific 50:11 50:15 71:4 96:9,14 119:23 140:18 154:12 157:22 211:23 221:18,19 238:18 325:17 326:24 specifically 11:24 18:9 29:7 64:3,10 75:14 81:2,20 83:10,20 84:3 89:23 97:8 102:2 105:11 112:14 113:14 119:1 140:16 156:18,24 157:24 167:25 204:25 219:7 230:7 236:7 254:10 264:8 333:6 specify 113:2 speculate 207:14 speculation 216:2 speculative 215:18	speed 78:21 spell 51:10 spend 71:9 spent 59:13,18 235:10 splits 203:7 spoke 57:9 spoken 335:17 spoliate 33:3 spoliated 12:14 12:17 15:12 27:6 spoliation 12:22 13:9 14:7,10,18 23:20 24:1 25:1 26:1,9 47:6 54:17 153:8 280:14 295:16 315:19 spot 251:17 spots 80:17 st 30:5,8,13 65:23,24 68:2 68:6 stack 281:8 stages 288:6,21 291:9 stamped 75:20 stand 62:19 standard 88:7 127:11 128:3 138:15,16,21 143:8 151:6,9	159:23 171:17 207:18 208:12 209:6,7,14 210:16 226:15 227:12 327:2 standards 14:22 16:10 17:1,5,6,10 23:23 35:2 36:19 37:10,18 37:21 87:17,22 87:23 88:2,10 88:13,17 89:17 94:3,19 96:23 97:7,19 103:3 124:13 132:16 135:1 144:11 150:2 208:19 208:25 237:18 238:2 279:5 326:24 340:14 starbucks 223:7 start 15:8 69:20 82:15 171:13 210:14 217:23 281:5 317:7 326:14 started 15:9 23:13 80:20 starting 40:7 45:13 112:18 168:25 174:7 179:13 183:3	183:17 184:4 188:10 214:19 215:3 216:20 240:17 starts 31:12 56:9 168:18 218:21 241:19 257:1 state 1:6 3:3 6:15 7:10,12 10:11,13,16 31:20 42:7 69:14 81:24 97:8 109:1 113:15 130:17 132:7 143:13 156:25 160:6,9 160:15 177:10 234:22 282:21 287:15 296:17 298:18 300:12 306:15 319:12 322:2 326:16 327:4 331:8 332:3 342:13 state's 236:13 stated 39:9,16 91:9,25 93:11 93:20 143:16 232:25 262:6 271:14 280:16 291:21 320:20 334:17 336:10
--	--	--	--

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[statement - substantial]

Page 70

statement 38:9	228:11 237:2	273:11 278:14	232:7 253:18
38:19 45:5	243:4 250:19	sticker 273:10	256:18
66:14 67:17	252:13 255:12	sticky 193:8	subheading
68:11 81:8,15	302:5 312:20	272:3	248:18 299:3
81:18 82:1	314:25 316:9	stop 30:9	subject 83:2
86:1,23 89:24	325:10 326:9	184:12 211:15	99:11 107:2
90:5 91:23	332:18	211:24	112:1 124:2
93:14 94:1,8	stating 42:7,8	stopped 332:3	127:6 128:9
108:1 111:9	78:12 81:9	332:13,16,17	129:12 138:3
112:16 124:11	91:5,17 131:9	stops 332:7	172:12 184:1
148:2 150:20	141:24 142:13	storage 221:16	215:13 219:14
155:24 157:17	153:20 216:1	235:12 249:19	246:3 257:18
162:17 166:15	216:21 252:20	267:16 268:3	258:12 266:7
197:9 223:17	295:6	store 266:21	267:11 297:2
223:22 238:18	statistical	267:6,7,7,9,16	submission
283:10 284:12	198:12	332:5	195:22
294:13 302:3	statistically	stored 15:24	submit 30:19
318:7 319:19	98:18 206:21	147:21 148:6	196:11
320:10,12,13	statistics	stores 266:10	submitted
325:22 326:4	158:11 194:20	storing 220:19	13:18 14:1,6
statements	204:10,13,15	straight 244:14	submitting
86:9 103:1	statute 189:20	streamline	56:11
253:12 294:10	stems 34:25	218:6,16	subscribed
310:2 324:18	stenographic...	street 3:14 4:20	342:10
324:20 325:7,7	2:7 338:12	171:22	subsequent
325:24 336:9	step 55:4 190:7	strike 17:13	99:12 100:9
336:14	190:15	135:25 200:3	subset 74:9
states 1:1 6:18	stepping 18:5	334:2	205:3,4 282:17
11:19,23 17:17	steps 19:2,10	strong 130:7	substance
68:17 69:11	55:7 151:3,7	stuck 231:19	251:23 310:20
78:11,16 85:25	151:22 190:18	study 98:16	substantial
89:19,20 90:5	294:21 314:21	stuff 73:15	107:16 162:20
112:19 120:11	stick 45:10	74:12 118:11	163:7
136:8 139:7	73:13 126:19	215:17 230:8	

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[substantive - take]

Page 71

substantive 77:18 78:5 81:16 90:22 91:3,6,15 92:1 116:20 252:22 319:24 335:4 335:10	suing 314:5,6 suit 299:6 327:3 sum 32:18 59:12 summarized 335:24 summarizing 112:6 296:6 superior 32:22 33:24 34:9 36:14 support 14:2,7 17:18 21:24 26:7 44:14 170:19 195:23 198:17 282:4 297:25 supported 94:1 94:19 supporting 88:3 supports 248:19 supposed 323:9 sure 16:11 33:6 35:9 50:17 58:3 66:10,22 73:9,21 76:13 78:24 80:6 93:17 95:17 116:1 117:16 118:24 119:2,6 134:4 136:21	144:9,16 149:17 162:8 166:7 170:10 172:10 173:13 174:23,25 178:8 188:4 205:11 219:17 219:21 231:24 231:25 240:24 247:18 252:2 258:7 259:24 263:4 265:11 278:2 285:11 302:13 303:1 304:18 306:11 316:15 326:23 334:7 335:9 surprising 157:23,25 surrounding 152:14 254:17 survey 98:22 suspect 255:8 suspend 172:5 172:15,24 suspended 173:16 swear 8:2 swiss 199:15 200:25 262:18 333:24 334:6 334:19 switch 152:1 189:24 213:12	287:3 switched 325:12,23 switching 116:2 117:18 sworn 8:6 27:3 338:6 342:10 system 82:17 105:4 122:8,15 123:8 139:4 170:11 209:15 211:15,25 227:6 244:25 245:1,21,22 246:14,24 247:20 248:1 304:24 systems 122:22 130:9 131:15 211:10 227:18
sucker 57:24 sufficiency 157:10 202:16 sufficient 86:12 120:25 153:24 154:15 155:13 155:19 156:21 157:19 159:7 159:22 160:5 160:22 203:22 329:15 suggest 50:19 83:17 suggested 230:7 suggesting 220:6 254:16 255:16 258:14 260:8 suggestion 230:23 suggestions 50:12 79:17 258:8 suggests 79:12 257:9			t
			t 8:5 338:1,1 339:6 342:1 table 101:8 315:14 335:25 tactic 164:19 take 6:11 9:8 15:17 19:2,10 30:19 31:25 53:13 55:13 65:1 87:10 98:11 103:16 111:22 112:2

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[take - terms]

Page 72

114:2 127:3,25	talked 86:17	team 71:15	213:15 219:21
139:22 151:7	110:18 114:11	98:11 109:24	265:20 278:17
169:18 177:16	141:22 187:5	teams 127:23	281:1 285:7
179:13 180:4	209:9 214:12	tech 61:20 62:3	290:4 324:4
184:4,11	247:5 253:12	62:10,13,16	329:14,25
189:15 190:6	272:11 281:12	63:22 64:3	336:17
190:14 201:14	300:1 336:4	104:6,14,18	telling 192:21
203:6 213:18	talking 13:7	105:2,11,23	215:23 284:25
222:19 238:6	35:9,10 43:13	107:16 108:17	tells 219:7
280:17 294:18	44:5 59:6	108:20,22	tempered
298:9 308:13	71:20 99:25	109:2,3,8,13,14	255:20
308:22 311:3	102:4 105:15	109:24 110:11	ten 56:22
323:6 324:2	123:3 124:19	110:15,23	149:18 213:17
327:21 331:15	126:14 159:3	111:14 176:1	278:1
taken 2:3,7	190:23 191:21	178:18 180:13	tend 78:21
54:10,12 65:5	194:3 203:11	183:5 238:24	tension 241:19
94:7 114:6	218:14 223:9	technical	241:21
177:21 215:15	233:4 241:5,7	273:16,24	tensions 243:21
222:24 274:24	265:8 267:1	274:1	248:11
279:20 280:21	271:25 283:4	technologies	terms 8:21
300:7 311:25	292:18 309:2	147:19 148:4	21:21 24:7
327:25 338:11	309:16 317:21	technology	27:10 30:21
talk 22:23 90:2	326:5	11:12 102:6	47:14 50:12
100:24 102:6	talks 80:13	133:22 187:20	51:24 54:8
117:14 118:10	81:15 86:25	187:21 255:22	63:11 64:18
118:21 126:24	tank 132:22	tell 48:6 62:2	67:10 82:10
130:25 132:20	133:10,14,16	74:17 80:6,25	84:25 128:25
139:11 152:1	292:8,14	86:13 95:1	134:11 139:24
152:19 156:21	tape 191:18	97:11 113:21	148:12 151:6
159:18 193:24	tasked 241:23	128:16 129:16	163:2 174:25
218:25 237:13	taught 30:7,11	132:11 163:21	192:13 194:19
268:8 275:7	65:23 68:2,9	180:9 182:23	206:20 215:23
276:5 278:7	teaching 30:5,7	183:11 186:5,6	216:22 217:1
288:15 327:19	30:9	193:7 197:24	235:23 244:14

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[terms - time]

Page 73

256:1 263:25	11:25 32:9	200:24,25	279:21 286:1
268:6 270:18	39:22 69:15	219:3 231:17	290:15 292:8
274:8 276:17	100:5 189:20	238:23 248:22	292:14 297:7
277:14 286:2	298:18 300:3	266:25 276:16	311:16 317:18
288:2 297:2	300:12 305:13	276:20 297:2	322:4 327:12
311:6 316:17	306:15,19	317:6	thinking
321:15 322:8	307:8 308:10	think 16:15	232:17
326:24 327:11	texas's 299:5	33:11 49:24	thinks 91:17
test 285:21	305:18	61:23 82:7	113:24
tested 330:7	text 19:24	93:14 105:14	third 61:3
testified 48:1,3	95:11 97:24	105:18 108:12	126:8 200:22
200:15 270:21	260:15,17	113:12 121:21	226:6 241:10
272:15 274:7	264:1 267:19	121:24 128:5	274:19
testifies 8:7	305:24	131:18 132:22	thorough
testify 135:19	thank 130:6	133:10,13,14	242:10
276:9 277:4	189:7 200:2	133:16 134:12	thought 266:25
338:7	236:1 268:23	135:16,16	three 60:6 61:1
testifying 47:23	317:13 327:20	141:20 150:16	61:22 84:6
testimony 21:1	337:10	154:12 155:25	85:17 86:17
21:13 27:4	thanks 79:2	159:4 160:18	238:19,19,25
37:13 44:11	theoretically	166:1,15 170:3	248:2 320:4
48:4 67:8 70:3	335:6,12	171:7 175:14	323:20
85:6 93:10,19	thing 9:6 35:9	182:24 190:9	throw 192:21
94:6 131:20	45:20 84:24	191:12 192:6	throwing 192:2
197:23 270:20	137:13 200:13	202:22 212:12	tie 198:22
270:24 271:3	200:22	213:12 216:6	time 6:3,9 7:11
271:21 272:10	things 8:24	230:2,13 232:9	14:12 26:6
292:10 323:19	13:17 24:4,11	233:12 239:20	27:8 40:11
328:19,23	49:18 66:8	247:14 250:24	59:4,5 65:3,6
334:6 337:15	74:11 116:21	253:9 257:21	78:25,25 87:10
testing 284:22	118:21 119:25	261:19,23	87:19 104:19
texas 1:2,6 3:4	120:1 132:5	262:21 263:10	113:22 114:7
3:7,21 4:4,12	159:4 176:4	266:12,24	127:5 157:3
6:15,19 10:16	182:2 196:13	268:21 272:22	164:18 177:18

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[time - transmits]

Page 74

177:22 180:19	timely 12:19	told 115:13	torrealba 3:10
183:2 184:20	131:10 153:24	163:12 197:16	7:22
185:23 187:10	154:14 155:12	200:23 273:25	total 206:19
188:2,11 203:6	155:19 157:18	282:15 283:23	totally 29:13
205:6 206:12	157:21,21	308:11	251:2 266:16
206:14 209:22	160:4,22	ton 75:13	touch 140:17
209:24 210:23	times 44:2	took 91:13,16	180:12
210:24 212:12	48:19 63:21	95:1 110:9	touches 238:22
213:14 221:9	96:13 121:4	170:15 227:9	towards 234:17
221:22 222:22	123:5,14	229:3 266:2	trade 4:11,19
222:25 229:6	204:21 258:24	272:15 326:2	54:9 55:12
229:23 230:13	timing 181:12	tool 99:10	188:7,18 189:2
231:15 232:12	title 72:18	104:12 110:2	189:12
232:13,22	225:4,14	115:20 126:24	trading 61:17
235:10 240:9	248:17 298:21	129:10 299:22	training 103:3
245:8 247:1	today 37:19	300:21 318:14	227:23 228:7
257:15 263:15	50:11 65:18	tools 115:14	228:10 229:6,7
263:18 264:22	96:12 214:13	126:3 128:6	229:21,25
266:2 272:6	228:12 238:13	249:18 293:3	230:3,5 293:2
274:25 279:20	239:7 258:24	300:20	trainings
280:19,22	263:23 276:9	top 224:24	229:17
289:24 290:16	286:5 328:20	234:25 278:4	transcript
297:13 298:12	328:24 329:21	281:7	72:11 273:3,5
300:5 301:9	330:14 335:1	topic 22:20	338:11 340:19
317:11 323:6	today's 120:18	23:19,25	342:3
323:12 324:6	171:5 263:24	105:20 117:5	transcripts
327:23 328:1	264:2 337:15	140:7 142:3,17	102:14 152:12
337:13 338:13	together 198:6	182:21 223:11	152:17 198:23
timeframe	toggle 271:7	228:5	233:1 265:24
204:24 223:25	285:3	topics 66:5	transfers
timeliness	toggling 269:17	115:15 117:14	254:22
155:5,21	270:4 272:2	139:12 216:7	transmits
156:16 157:10	286:9	293:12	171:25

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[transparent - under]

Page 75

transparent	103:13,20	283:5 290:23	84:14 91:4
293:5 296:19	104:14 118:19	303:15 304:7	92:2 211:20
trash 192:10,23	144:10 151:18	309:20,20,20	u
193:4	151:23 163:10	315:11 326:4	u 8:5 342:1
treated 94:22	166:18 168:2	335:21	ultimate
treatise 225:4	168:10,14	turned 113:10	169:23
225:22	196:7 223:25	126:11 199:20	ultimately
treatises 94:4	250:16 256:14	262:11,12,13	272:10 279:7
treatment 92:3	267:25 272:25	262:14,15,16	unable 19:23
trend 104:18	279:9 288:7	323:13 324:6	282:18
tried 23:18	295:3 306:4	turning 83:8	uncertain
trier 16:18,19	307:12 308:7,8	140:4,5,10	166:13,21,22
36:24 46:12,15	308:18,25	141:3 317:10	unchangeable
46:22	309:12 314:15	turns 333:20	282:2
trigger 36:21	317:3,4 319:3	334:12	unchecked
178:11 184:6	338:10	tweak 231:12	220:1
188:5 191:23	truly 205:4	twice 216:6	unclear 142:18
triggered 35:19	trust 170:12	two 8:24 51:3	162:15
35:20 174:21	truth 338:7,7,8	55:20 56:20	undated 228:9
175:1,8 178:19	try 23:17 41:12	59:18 60:5,24	228:11
188:6	138:7 165:19	63:2 72:24	under 14:13
triggers 34:8	182:10 221:24	89:7 107:14	17:23 18:11,24
trivial 235:7	trying 29:14	118:8,18 142:5	19:13 20:14
trouble 22:11	130:19 166:20	155:17 215:10	27:3 30:14
212:6,10	173:14 175:12	245:11 248:2	48:22 59:24
274:20	175:17 262:25	266:25 304:18	60:2 76:5
true 13:6 15:13	290:20	type 57:11	84:10 85:25
17:23 18:7	tuesday 71:24	137:13 185:15	119:8 122:22
19:12 20:13	turn 40:2 72:16	221:19 225:22	123:7,16
21:9 24:10	139:13 140:19	250:5 262:19	129:11 135:19
27:20 29:8	199:18 233:6	305:25	144:10,12
38:7 66:24	259:4 261:5	typed 60:18	146:19 151:1,7
67:1,23 98:5	262:8 275:12	types 49:18	159:23 173:1
98:17 99:5,6	281:8 282:18	81:17 82:2	

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[under - user]

Page 76

183:6 196:6,17 198:1 201:10 208:25 209:7 226:6 246:7 247:22,23 248:2,10,17 249:4 261:16 263:7 266:22 277:4 278:17 285:13 297:23 323:20 326:14	151:25 158:19 159:1 171:16 177:11 229:5 229:16 247:4 269:19 270:7 272:14 277:13 278:19,24,25 298:14 305:18 306:20,25 312:19 313:16 332:25	universe 73:4 311:13 university 10:8 65:24,25 unmarked 308:24 unnecessary 248:21 unreasonable 190:5,14 unredacted 119:18 unsent 204:23 unusual 78:15 79:14 107:23 108:7,13 updated 59:4 60:20 66:3 224:23 225:23 226:3 289:24 290:2,5,13,16 upper 315:20 urged 139:3 usage 200:16 249:17 use 14:16 33:19 38:25 50:19 82:17 99:10 108:23 109:10 113:16 115:13 115:20 116:19 117:8,9,13 118:2 122:7,15 122:21,25	123:8 125:8,19 130:8 131:14 135:21 136:19 138:2 139:4,11 142:20 147:11 157:20 216:25 217:3 222:20 236:5,9 241:12 243:5,17 248:11 255:9 256:13 257:6 257:15 269:10 291:11,14 292:9 314:17 317:23 318:20 318:22 319:24 330:25 331:5 used 8:13 12:21 31:16 102:5 119:24 133:13 141:7,12 215:15 242:2 246:18 255:18 264:5 269:8 276:10 296:3 313:15 314:20 318:14 319:15 320:10,15 330:1 useful 235:9 usefulness 251:13 user 251:14 268:18 278:20
undermine 39:3 40:6 45:12 214:17 underneath 235:4 understand 8:20 28:11 81:19 96:13 119:7 175:17 178:9 181:11 196:10 208:5 209:1 252:24 253:16 259:25 259:25 260:13 266:17 287:25 299:17 305:24 306:13 323:3 331:18 understanding 18:4 19:6 27:25 29:12 37:3 62:13 70:12,14	understands 169:24 understood 9:17,22 16:12 33:6 148:7 149:4 undertaken 268:1 unequal 312:21 313:11 315:5,9 uniform 226:15 unique 50:14 unit 273:20 274:10 275:24 327:10 united 1:1 6:18 17:17 units 270:13,15 270:17 271:1,5 271:23 273:18 275:10 universally 93:2,8		

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[user - want]


Page 77

307:11 308:10 308:11,12,16 308:20,22 users 277:2,3 281:14 282:10 285:2 using 100:24 105:5 107:20 108:4 140:12 140:20 187:21 233:15 243:22 274:19 276:17 286:6,19 329:5 usual 78:17 86:11 221:2 usually 11:11 48:13 111:16	various 83:18 100:9 183:4,7 183:18 185:16 203:20 232:10 314:17 vary 185:13 vault 143:4 veered 107:19 verbal 123:4 veritext 7:1,4 version 126:16 228:25 263:24 264:2,4,6,10 277:6 289:22 versions 114:25 140:1 276:6,6 276:9 versus 6:16 192:10,22 243:23 244:19 252:8 vet 288:6,21 291:8 video 5:3 6:10 6:13 videographer 6:1 8:1 65:3,6 114:4,7 177:18 177:22 222:22 222:25 280:19 280:22 317:12 327:23 328:1 337:13	videotape 1:15 videotaped 2:2 view 11:14 38:5 41:20 48:8 80:15 83:12 93:6 98:3 113:4 152:2 160:16 164:9 183:10 184:6 184:12 194:12 216:19 263:20 264:20 280:1 293:13 303:9 313:10 319:3 views 112:21 131:9 viii 317:17,19 violate 112:8 112:15 113:5 113:13 210:15 216:4 243:7 violated 15:6 132:8 violates 131:19 132:6 136:4 violating 137:2 137:12 violation 130:15 132:8 209:13 violations 189:19 222:10 virtue 331:19	voice 297:12 volume 124:23 144:20 145:1,7 145:16 202:18 222:6 237:19 238:7,15,22 242:21 339:21 340:15 volumes 89:7 203:24 220:1 249:11
v			w
v 1:8 53:16 196:16 197:2 197:11 202:2 vague 150:20 150:21 value 77:19 78:5 81:16 90:22 91:3,6 91:16,18 92:1 249:15,17 250:1,7,14 251:11 252:8 252:16 254:12 variety 133:22			wait 9:9 228:16 237:23 wake 100:11 180:22 181:9 walker 43:17 44:7 45:18 214:6,12 223:24 330:15 340:5 walking 171:5 171:9 want 8:25 16:11 20:5,21 22:23 24:16 28:13 33:5,16 35:8 49:9,19 72:16 73:13 77:12 93:17 95:17 97:4 125:22 126:23 126:25 143:17

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[want - work]

Page 78

146:10,11	161:11 195:1	websites	339:2
163:25 171:2	211:12 218:9	187:20	witnessed
171:18 177:25	219:4 223:3	week 120:12	24:25 269:13
178:8 201:23	232:23 233:19	199:23	286:6
213:17,22	233:21 239:23	weeks 70:1	witnesses 78:21
215:2 221:7	244:6 246:7	71:10 72:24	word 12:21
223:11 230:1	247:20 251:18		14:10 50:8
235:20 237:13	258:9 264:12	325:19	51:9 113:17
240:23 241:17	264:13 277:11	went 20:24	125:4,4 129:20
249:21 253:8	282:17 285:17	21:10 31:2	133:14 149:17
256:23 258:7	288:3,18 291:2	55:6 114:12	157:20 216:25
259:24 269:24	291:6 292:16	244:17 248:13	217:3,9 240:23
273:12 275:7	307:10 315:24	303:5 310:2	240:23 267:18
285:15 290:22	318:4 332:3	west 4:3	286:25 287:1
298:1 306:5	333:24 337:6	westlaw 168:17	291:12
317:16 324:2	ways 40:9	whispering 6:7	words 31:4
327:21 335:21	45:15 49:17	whiteboard	50:19 142:8,20
wanted 56:13	206:17 215:16	193:13,16	246:15 260:4
58:15 59:12	216:21 228:15	whiteboards	280:13 291:13
85:15 200:8	261:20 304:1	193:20	291:16 292:9
278:11 303:17	we've 34:17	widely 81:3	321:9
317:6	45:16 63:4	widespread	work 30:24
wants 255:6	104:4 113:1,20	76:10 79:19	32:1 47:14,17
washington	166:3 187:5	81:11 84:13	48:8,10 49:11
3:15	190:23 209:9	86:3 89:22	50:4 61:11
watch 273:10	213:13 253:10	90:8,17 112:20	69:14,21 94:9
watchdog	254:5 278:1	241:13	95:3 96:16
51:12 52:11,14	299:17 334:21	willing 50:10	98:17 116:17
52:19 53:9,15	web 49:13	window 285:14	127:14 128:15
53:16 339:10	website 29:22	wish 343:1	144:11 197:24
way 32:16 38:1	30:2,14 65:14	witness 7:25	200:8 201:2,22
51:16 138:25	65:18 68:6	8:2 95:18	202:1,5 206:8
139:2 143:16	339:15	203:3 222:17	237:6 269:10
149:2 154:18		222:20 327:17	269:11 300:19

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

[worked - zoom]

Page 79

worked 61:22 62:8,14 64:20 68:14,15,22,25 69:4,9 129:18 181:24 208:20 208:20 286:12 286:20 working 37:4 48:12 71:15 133:25 145:11 145:12,14,18 145:19,24 218:6,15 workings 242:6 works 279:2 workspace 268:10 269:2,9 269:11,14 270:1,11,18 274:10 275:25 276:10,13 278:6 workspaces 286:3 world 4:11,19 49:14 216:5 wrap 129:19 write 30:17,23 215:13 216:7 224:19 273:12 289:20 291:6 291:23 297:9 writes 215:12 242:9 302:10	307:9,14 writing 66:9 194:20 215:17 228:16,17 232:7 239:4 265:17 296:7 306:19 written 31:4,9 57:12 66:5,21 67:9 209:10 210:17 290:18 293:17 306:14 wrong 21:25 40:3 178:5 209:13 215:22 216:5,17 251:17 275:21 275:22 280:2 wrongdoing 187:2,6,12 256:14 wrote 40:5 57:2 57:2,6,7 60:22 97:17 196:16 224:21 226:1,2 226:10,18,20 226:23 227:14 228:13 289:17 290:25 293:19 294:16 300:18 308:10 309:9 wulfsberg 4:15 7:19	x x 1:5,11 135:8 339:1,6 xv 153:22 xviii 323:9 y yeah 36:2,2 48:14 60:17 84:19 86:23 103:19 142:12 146:3 153:10 157:5 162:13 187:4 191:14 194:15 252:1 319:20 335:15 year 10:24 56:22 68:7 170:15 179:18 180:5 182:9 184:5 196:20 198:2,11,20 201:4,13 202:12 206:2 207:22 208:16 212:14 227:21 289:20 316:8 316:13,15,16 years 23:1,3,6 23:12,16 24:24 25:24 30:12 34:6 37:3 59:6 59:8,14,18 66:1 68:3,10	94:17 110:21 182:1 186:5 232:17,17 238:19,20,25 266:6,23 268:4 279:9 281:14 289:25 290:3 yetter 297:19 298:5,11 341:2 york 2:6,6 4:21 4:21 6:24 10:14 31:20 32:1 52:20 237:24 310:9 yup 46:5 142:9
			z
			zero 213:14 zip 267:18 zoom 3:16,22 4:22

Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted

fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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